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IN THE
Supreme Court of the United States

HOLLIS EARL ROBERTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, authorizes the Secretary of the Interior—"in his discretion"—to acquire land "for Indians." The Secretary has acquired thousands of properties across the country pursuant to Section 5, including office buildings, houses, residential lots, and other sundry parcels. All told, the acquisition of such property has removed vast areas of land from state and local jurisdiction, and correspondingly expanded federal and tribal jurisdiction. The questions presented are:

1. Whether—as the Eighth Circuit has held and the Tenth Circuit declined to hold below—the standardless delegation by Congress of totally "discretion[ary]" authority to an Executive official to acquire land "for Indians" is an unconstitutional delegation of legislative power; and

2. Whether, if not, an Executive official's acquisition of off-reservation property pursuant to this authority is enough—standing alone—to transform the property into "Indian country" under 18 U.S.C. § 1151, a question of touchstone jurisdictional significance on which the federal circuits are divided.

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IN THE

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No. 99-____

HOLLIS EARL ROBERTS,

Petitioner,

v.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Hollis Earl Roberts respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit is reported at 185 F.3d 1125 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for the Eastern District of Oklahoma on the jurisdictional issues raised here is reported at 904 F. Supp. 1262 and reproduced at App. 38a.

JURISDICTION

The judgment of the Tenth Circuit was entered on August 3, 1999. App. 1a. The Tenth Circuit denied a timely petition for rehearing and suggestion for rehearing en banc on September 14, 1999. App. 53a. On December 2, 1999, Justice Breyer extended the time to file a petition for a writ of certiorari to and including January 12, 2000. App. 54a. The jurisdiction of the Tenth Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 1 of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 8, Clause 3 of the Constitution gives Congress the authority "[t]o regulate commerce * * * with the Indian Tribes."

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, provides in pertinent part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

The provisions of 25 U.S.C. § 465 are reproduced in full at App. 55a-56a, together with 18 U.S.C. §§ 1151 and 1153.

INTRODUCTION

This petition raises profound questions concerning the structure of our constitutional government and the scope of Indian country codified by 18 U.S.C. § 1151, arising in a context that has touchstone jurisdictional significance for the division of federal, state, and tribal authority over thousands of properties and vast areas of land across the country.

The first question concerns the limits on the delegation of legislative power vested in Congress by Article I. As this Court observed long ago: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field* v. *Clark*, 143 U.S. 649, 692 (1892). Over the past half century, however, "the principle that Congress c[an] not simply transfer its legislative authority to the Executive [has fallen] under a cloud." *Industrial Union Dep't* v. *American Petroleum Inst.*, 448 U.S. 607, 674-675 (1980) (Rehnquist, J., concurring in the judgment). As a result, at the same time that questions concerning the breadth of legislative delegations have arisen with new urgency in a variety of regulatory contexts, conflict and confusion have smoldered in the lower courts over the application and even continuing viability of the nondelegation doctrine.

Guidance is sorely needed from this Court on this basic principle of constitutional government, and this case presents an ideal vehicle for providing it. It presents a challenge to Section 5 of the Indian Reorganization Act of 1934 ("Section 5"), 25 U.S.C. § 465, which authorizes the Secretary of the Interior—"in his discretion"—to acquire property in trust "for Indians." The Tenth Circuit below expressly rejected the conclusion of the Eighth Circuit that the delegation of this purely "discretion[ary]" power violates the nondelegation rule. App. 17a–18a. Three Terms ago, this

Court granted certiorari in the Eighth Circuit case and, at the request of the United States vacated the Eighth Circuit decision and remanded to the Secretary for reconsideration of his decision under newly issued regulations that are inapplicable here. The same issue is squarely presented here—but without the wrinkle that caused vacatur in the Eighth Circuit case—and now should be decided.

The second question presented follows from the first: if Section 5 permissibly delegates to the Executive carte blanche to acquire property in trust for Indians, then is the fact that off-reservation property was acquired pursuant to Section 5 enough—standing alone—to transform the property into Indian country within 18 U.S.C. § 1151? Conflict and confusion surround that issue as well. While acknowledging the directly contrary position of the Eighth Circuit, the Tenth Circuit below answered this question in the affirmative. But at the same time, the Tenth Circuit could not agree into which Section 1151 category of Indian country the property at issue in this case—an office complex located in downtown Durant, Oklahoma—fits. For its part, the United States took the position that the property was Indian country even though it freely conceded that the property did not fit into *any* of the Section 1151 categories.

Indian country is the touchstone for delineating federal, state, and tribal sovereignty over property, as well as jurisdiction over activities occurring on it. Acting pursuant to Section 5, the Secretary has acquired thousands of properties across the country ranging from office buildings like the one in this case to houses to industrial sites—even a former Sears department store. *See Ringsred* v. *City of Duluth*, 828 F.2d 1305 (8th Cir. 1987). As this case illustrates, many of these properties are not only off-reservation, they are just off Main Street in towns across the country. If the Secretary is free to stockpile such properties for Indians—with no guidance at all from Congress on what

standards to apply in doing so—then this Court should decide whether the mere fact that the Secretary has elected to do so transforms the property into full-blown Indian country within the meaning of Section 1151.

STATEMENT OF THE CASE

1. Hollis Earl Roberts ("Roberts") served as Principal Chief of the Choctaw Nation of Oklahoma for 19 years, and was vested with "'the Supreme executive power of this Nation.'" App. 2a (quoting *Constitution of the Choctaw Nation of Oklahoma*, article VI, sec. 1). In June 1995, he was charged in an eight-count indictment in the Eastern District of Oklahoma with aggravated sexual abuse, sexual abuse, and abusive sexual contact, in violation of 18 U.S.C. §§ 2241, 2242, and 2244. The indictment alleged that Roberts had forced unwanted sexual actions on members and employees of the Choctaw Nation in the administrative offices used by Roberts. Roberts contended that any such acts were consensual, and that the charges were part of a scheme to remove him as Principal Chief of the Choctaw Nation. He was convicted on three counts and is currently serving a sentence of imprisonment.

Federal jurisdiction over the prosecution was predicated on the Indian Major Crimes Act, 18 U.S.C. § 1153. That Act provides that "[a]ny Indian who commits" specified offenses "within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." *Id.* Thus, it was an element of the offense that the actions at issue took place "within the Indian country"—an allegation that Roberts challenged at every turn. The alleged "Indian country" in which the acts at issue took place is an office building complex located at 16th and Locust Streets in Durant, Oklahoma. The complex formerly housed the Oklahoma Presbyterian College for Girls but now

houses administrative offices of the Choctaw Nation, as well as offices of and a museum operated by the Red River Valley Historical Association.

The process by which the United States came to hold title to the property began in 1975, when the United States Marshal for the Eastern District of Oklahoma conveyed the property to the Historical Association. App. 41a. On July 19, 1976, the Association conveyed the property to the Durant Chamber of Commerce. About three weeks later, the Chief of the Choctaw Nation—Roberts's predecessor—requested that the United States accept the property in trust for the tribe, and six days later the Chamber of Commerce conveyed the property to the United States in trust for the Choctaw Nation. While the United States thus acquired title to the property at issue by August 11, 1976, no official of the federal government had yet purported to approve the request to accept the land in trust for the Choctaw Nation. That action did not occur until August 25, 1976, when the Area Director of the Bureau of Indian Affairs for Muskogee, Oklahoma executed his approval of the trust transaction.

The only statutory basis for acquisition of this property by the United States in trust for the Choctaw Nation is Section 5, which provides that "[t]he Secretary of the Interior is hereby authorized, in his discretion, to acquire * * * any interest in lands * * * for the purpose of providing land for Indians." 25 U.S.C. § 465. At the time the United States acquired the Durant property, there were no regulations addressing the exercise of the discretion afforded by this provision; such regulations came into existence only in 1980—more than three years after the property in this case was acquired. *See* 45 Fed. Reg. 62036 (1980).

Since at least 1974, the Secretary has delegated his authority "with respect to the management of all Indian affairs and all matters arising out Indian relations" to the

Commissioner of Indian Affairs. *See* 39 Fed. Reg. 32166-67 (1974) (replacing item-by-item delegations dating from 1949 with general delegation of authority). The authority delegated by the Secretary has been redelegated to BIA Area Directors. 34 Fed. Reg. 637 (1969). *See* App. 50a-51a. Thus, under these authorities, the Area Director who took the office buildings in this case in trust for the Choctaw Nation had authority to do so only by redelegation of the authority granted to the Secretary by Section 5.

2. Roberts moved to dismiss the indictment against him on jurisdictional grounds. In particular, he argued that the building complex is not Indian Country within 18 U.S.C. § 1151 because—while the property may be held in trust by the United States—the property does not fit into any of the categories codified by Section 1151. That is, the complex is neither an Indian reservation, dependent Indian community, nor allotment.[1] Roberts also argued that the Secretary lacks authority to take land into trust for tribes in the first place because Section 5 provides no standards to guide the exercise of the discretion it confers, and therefore constitutes an unconstitutional delegation of authority. The District Court rejected these contentions. *See* App. 47a.

The Tenth Circuit affirmed. With respect to the issues presented here, the Court first considered Roberts's "fervent

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[1] Section 1151 defines Indian Country as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

argument that the property's trust status does not establish Indian Country" under Section 1151. App. 4a. There is no question that the office complex is not part of any federally designated Indian reservation or allotment, and it does not resemble a dependent Indian community in any conventional sense; indeed, the government *conceded* as much. *See infra* at 23. But the Tenth Circuit nevertheless held that "lands owned by the federal government in trust for Indian Tribes are Indian Country pursuant to 18 U.S.C. § 1151." App. 7a. In reaching this conclusion, the Tenth Circuit declined "to affix" any "categorical label" to the property at issue in accordance with the terms of Section 1151. App. 11a.

The Court of Appeals also rejected Roberts's argument that Section 5 "unconstitutionally delegates standardless authority to the Secretary." App. 17a. While the court recognized that the Eighth Circuit had so held in *South Dakota* v. *United States Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), it dismissed that opinion because this Court vacated it after the government changed its legal position when it sought review in this Court. *See* 519 U.S. 919 (1996). The Tenth Circuit below expressly disclaimed reliance on the BIA regulations—adopted after the acquisition at issue here—purporting to find standards limiting the Secretary's discretion in "the statute itself." App. 18a n.8. The Tenth Circuit also relied on certain "goals" identified in the legislative history, and found that the Secretary had not transgressed any of the standards articulated there. *Id.* Rejecting all other arguments on appeal, the court affirmed Roberts's conviction.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE THE CONFLICT AND CONFUSION OVER THE CONTINUING VITALITY OF THE NONDELEGATION DOCTRINE AND ITS APPLICATION TO SECTION 5 OF THE INDIAN REORGANIZATION ACT.

1. Federal jurisdiction over the charges against Roberts was based solely on a decision by an Area Director from Muskogee to acquire a building complex that used to be a girls school but came to house the administrative offices of the Choctaw Nation. The authority for that decision was a delegation from the Secretary of the Interior, and subsequent redelegation by his delegate, of the statutory authority set out in Section 5, 25 U.S.C. § 465—*i.e.*, the purely "discretion[ary]" authority to acquire land "for Indians."

This exceptionally broad delegation squarely implicates the constitutional nondelegation doctrine—a doctrine "rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989). This doctrine has been recognized by this Court since at least *Field* v. *Clark*, 143 U.S. at 492, but it has existed since the days of Locke. *See Loving* v. *United States*, 517 U.S. 748, 758-759 (1996); John Locke, *Second Treatise of Government* 87 (R. Cox ed. 1982) ("The power of the legislative being derived from the people by a positive voluntary grant and institution, can be no other, than what the positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands"). Today, the doctrine is shrouded in doubt.

Over the past half century, the nondelegation doctrine has fallen "under a cloud," *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.* ("*Benzene*"), 448 U.S. at 675

(Rehnquist, J., concurring in the judgment), spawning debate among Members of this Court,[2] judges in the lower courts,[3] and those in the academy.[4] While the Tenth Circuit below upheld the statute against Roberts's nondelegation doctrine challenge—squarely holding that "the statute itself provides [adequate] standards for the Secretary's exercise of discretion," App. 18a n.8—its decision conflicts with the conclusion of the Eighth Circuit on the very statute in question. This Court should grant certiorari to address the important and recurring issues concerning the nondelegation doctrine and its application to the limitless delegation of jurisdictionally-significant authority under Section 5.

2.a. In *South Dakota* v. *United States Department of Interior*, 69 F.3d 878 (8th Cir. 1995), the Eighth Circuit considered South Dakota's challenge to a decision by the Assistant Secretary of the Interior to acquire 91 acres of land—located seven miles from the reservation of the Lower

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[2] *See infra* at 16.

[3] *See, e.g., American Trucking Ass'ns* v. *United States Envtl Protection Agency*, 175 F.3d 1027, 1034-40 (D.C. Cir. 1999) (finding nondelegation doctrine violated); *id.* at 1057-62 (Tatel, J., dissenting in part) (criticizing majority for "ignor[ing] the last half-century of Supreme Court nondelegation jurisprudence"). *See also American Trucking Ass'ns* v. *United States Envtl Protection Agency*, 195 F.3d 4 (D.C. Cir. 1999) (modifying panel opinion); *id.* at 14 (Silberman, J., dissenting from denial of rehearing en banc); *id.* at 16 (Tatel, J., joined by Edwards, C.J., and Garland, J., dissenting from denial of rehearing en banc) ("The panel's nondelegation holding plainly involves a question of exceptional importance warranting en banc review. * * * [T]he panel depart[ed] from a half century of Supreme Court separation-of-powers jurisprudence.") (citation and internal quotation marks omitted). The *ATA* case is discussed more fully *infra* at 17-18.

[4] *See, e.g.*, Symposium, *The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives*, 20 Cardozo L. Rev. 731 (1999) (various articles on nondelegation doctrine).

Brule Tribe of Sioux Indians and partially within the City of Oacoma, South Dakota—in trust for the Tribe. The Secretary moved to dismiss the suit on the ground that the acquisition was "committed to agency discretion by law." *See* 5 U.S.C. § 701(a)(2); *Heckler* v. *Chaney*, 470 U.S. 821, 828-830 (1985). The Eighth Circuit, however, held Section 5 unconstitutional under the nondelegation doctrine.

The court noted that Section 5 "defin[es] no boundaries to the exercise of this [land acquisition] power," and "leaves the Secretary free to acquire for a multitude of purposes, for example, to expand a reservation, to provide farm land for rural Indians, to provide a factory for unemployed urban Indians, to provide a golf course for tribal recreation, or to provide a lake home for a politically faithful tribal officer." 69 F.3d at 882. "Indeed," the Eighth Circuit observed, the terms of the statute would "permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present. There are no perceptible 'boundaries,' no 'intelligible principles' within the four corners of the statutory language that constrain this delegated authority—except that the acquisition must be 'for Indians.'" *Id.*

Turning to the statute's legislative history, the court found that Congress had an "agrarian focus" in mind when it adopted Section 5, *id.* at 883, but "failed to include [in the statute] standards to reflect its limited purpose." *Id.* Nor, given the fact that the Secretary had interpreted the statute "as broadly as possible," *id.* at 884, was there any potentially relevant narrowing construction offered by the agency. "The result," the Eighth Circuit held, "is an agency fiefdom whose boundaries were never established by Congress, and whose exercise of unrestrained power is free from judicial review. It is hard to imagine a program more at odds with separation of powers principles." *Id.* at 885.

It is just that program, however, that the Tenth Circuit upheld below. Barely pausing to consider the reasoning or context of the Eighth Circuit's opinion in *South Dakota*, the Tenth Circuit below was content to observe that, because the *South Dakota* decision has been vacated by this Court, "it has no precedential value to us." App. 18a. It is true that the Eighth Circuit decision was vacated, but it is clear that the vacatur rested on a ground not applicable to this case. Thus, while the Eighth Circuit's decision may no longer be binding, the reasoning it articulated would have compelled a different result in this case had it been adopted by the Tenth Circuit.

The court below was unable to discern the basis for this Court's action in *South Dakota*, App. 18a, but the record in that case makes clear that the vacatur was based on the Secretary's supplementation of regulations first issued in 1980—nearly half a century after Section 5 was adopted—which were inapplicable to the 1976 acquisition at issue here. Having lost the *South Dakota* case in the court of appeals, "the federal government * * * abandoned the position" that the exercise of authority by the Secretary under Section 5 is unreviewable and "issued a final regulation that acknowledges and affords an opportunity for judicial review of his Section 5 decisions." Pet. for Cert. in *United States Dep't of Interior* v. *South Dakota*, No. 95-1956, at 24 (filed June 3, 1996) ("*South Dakota* Petition"). The government urged the Court to vacate the Eighth Circuit's judgment and remand the case with instructions to further remand to the Secretary to reconsider the acquisition at issue. *Id.* at 24-26. The Court did so, over the dissent of Justice Scalia, joined by Justices O'Connor and Thomas. *See* 519 U.S. 919 (1996).

As the Tenth Circuit acknowledged below, neither the Section 5 regulations nor the procedure for reviewing decisions made under those regulations—on which this Court's vacatur in *South Dakota* was based—were available at the time of the acquisition of the property at issue here.

App. 18a n.8. Instead, the Tenth Circuit decision rested on its view that "the *statute itself* provides standards for the Secretary's exercise of discretion." *Id.* (emphasis added). *See also* App. 18a (the statute "place[s] additional limits on the Secretary's discretion"). For that proposition, the Tenth Circuit cited its earlier decision in *McAlpine* v. *United States*, 112 F.3d 1429, 1432 n.3 (10th Cir.), *cert. denied*, 522 U.S. 984 (1997)—which relied on Judge Murphy's *dissent* in *South Dakota*.

Thus, it could not be clearer that the reasoning of the Eighth Circuit in *South Dakota* and the Tenth Circuit below are squarely in conflict. While the Eighth Circuit held that Section 5 "define[s] no boundaries to the exercise of this [acquisition] power," 69 F.3d at 882, and contravenes the nondelegation doctrine, the Tenth Circuit held that "the statute itself" provides the standards necessary to avoid a delegation problem. App. 18a & n.8. In reaching this holding, the Tenth Circuit relied on the views of the judge who dissented from the Eighth Circuit's decision. While the Eighth Circuit decision was ultimately vacated by this Court, the only basis suggested to the Court for doing so is inapplicable to this case. Quite plainly, this case would come out differently under the rationale of *South Dakota*.

b. The circuit conflict does not end there. Like the Eighth Circuit, the Eleventh Circuit has also recognized that "the statute itself"—on which the Tenth Circuit relied below — provides no intelligible principle to guide the Secretary in the exercise of the discretion it grants. In *Florida Department of Business Regulation* v. *United States Department of Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986), the court held that the Secretary's decision under Section 5 was an unreviewable exercise of discretion. It relied, *inter alia*, on its view that Section 5 "does not

delineate the circumstances under which exercise of this discretion is appropriate." *Id.* at 1256.[5] The Tenth Circuit rejected the Eleventh Circuit's *Florida* decision in *McAlpine* v. *United States*, *supra*, based on its view that the regulations under Section 5 provided sufficient guidance "[e]ven assuming that the statutory language contained in § 5 of the IRA does not provide 'law to apply' in this case." 112 F.3d at 1434. Now that the court has reached a similar conclusion in a case in which the regulations are indisputably inapplicable, it has plainly rejected the view of the Eleventh Circuit on the statute as well.

3. The conflict over the constitutionality of Section 5 is far from academic. As the United States has noted, "[f]or more than 60 years, Section 5 has provided the primary mechanism for the federal government to restore and replace tribal lands," and has been the source of authority for "thousands of acquisitions (covering an estimated 9 million acres)." *South Dakota* Petition at 16, 17. Literally thousands of applications, moreover, are pending before the Secretary to acquire additional lands pursuant to Section 5. *See* 64 Fed. Reg. 17574, 17580 (1999) (in 1996, 6941 applications were filed with the Secretary to place lands in trust).

The myriad properties and vast areas of land taken into trust under Section 5 are insulated from state and local control in several significant respects. First, as specifically stated in Section 5 itself, trust land is exempt from state and local taxation. *See* 25 U.S.C. § 465 (Section 5 "lands or rights shall be exempt from State and local taxation."). *See also Cass County, Minn.* v. *Leech Lake Band of Chippewa*

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[5] The case did not involve a constitutional challenge to the statute, 768 F.2d at 1252, but the Eleventh Circuit's conclusion that Section 5 confers standardless authority on the Executive to acquire land into trust bears directly on the question presented here.

Indians, 524 U.S. 103, 114 (1998) (Section 5 sets forth "procedure by which lands held by Indian tribes may become tax-exempt"). Second, as discussed more fully in Part II below, many lower courts—including the Tenth Circuit below—have adopted the position that trust land is "Indian country" for jurisdictional purposes, removed from state civil and criminal jurisdiction in the absence of the tribe's consent. 25 U.S.C. §§ 1321, 1322. Current Interior regulations also provide that such land is generally exempt from state and local land use regulation. 25 C.F.R. § 1.4.

The conflicting decisions of the courts of appeals introduce great uncertainty about the very nature and control of the lands at issue. So long as a cloud exists over the Secretary's authority to take lands into trust under Section 5, the taxing, regulatory, and civil and criminal authority over vast areas of land is subject to challenge and confusion. As this Court has observed, however, "[s]ound judicial policy does not encourage a situation which necessitates constant adjudication of the boundaries of state and federal competence." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 376 (1959). That is, jurisdictional determinations should be clear, and not shrouded in doubt. The Court should eliminate that doubt here.

4. The nondelegation issue implicated by the decision below, moreover, reaches far beyond the particular context at issue here, for debate over this fundamental separation of powers doctrine continues unabated. While it has become commonplace to observe—as the Court of Appeals did below—that "only twice in its history, and not since 1935" has the Court "invalidated a statute on the ground of excessive delegation of legislative authority," App.19a n.9,[6]

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[6] *See A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935).

the Court has not repudiated the doctrine, and various Members of the Court have continued to discuss—and rely on—its validity in a variety of contexts. *See, e.g., Clinton* v. *City of New York*, 524 U.S. 417, 484 (1998) (Breyer, J., dissenting) ("The 'nondelegation' doctrine represents an added constitutional check upon Congress' authority to delegate power to the Executive Branch. And it raises a more serious obstacle here"); *Loving*, 517 U.S. at 758-759, 771-773; *Touby* v. *United States*, 500 U.S. 160, 164-165 (1991); *Benzene*, 448 U.S. at 646 (plurality opinion) (rejecting broad construction of statute urged by agency to avoid nondelegation problem); *id.* at 671-688 (Rehnquist, J., concurring in the judgment) (concluding that statute at issue violates nondelegation doctrine). Other Members of the Court—and commentators[7]—have assumed that the doctrine is all but dead. *See, e.g., Mistretta* v. *United States*, 488 U.S. at 416 (Scalia, J., dissenting) ("What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny * * * ?"); *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 352-353 (1974) (Marshall, J., joined by Brennan, J., dissenting) (nondelegation doctrine "has been virtually abandoned by the Court for all practical purposes").

Given the unsettled state of the Court's teaching on the nondelegation doctrine, lower courts are at a loss to determine how and when—or, indeed, whether—to apply it.

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[7] *See, e.g.*, Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. Pa. L. Rev. 759, 839 (1997) ("we live in a constitutional world where the nondelegation doctrine remains dead"); Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 Yale L.J. 529, 549 (1997) ("the nondelegation doctrine is effectively dead"); Timothy A. Wilkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 Geo. Wash. L. Rev. 479, 541 (1995) (doctrine has "receded into purgatory").

As described above, the lower courts' confusion is evident in the conflicting analyses of the unlimited delegation in Section 5, but recent opinions make clear that the confusion is not limited to that context. The most prominent example is the *American Trucking Associations* case, *supra*, in which a sharply divided panel of the D.C. Circuit found that "the construction of the Clean Air Act on which EPA relied in promulgating [the regulations] at issue here effects an unconstitutional delegation of legislative power." 175 F.3d at 1033. The dissent, meanwhile, had little difficulty concluding that no nondelegation doctrine problem existed, relying on "the last half-century of Supreme Court nondelegation jurisprudence" and the First Circuit's rejection of "a similar nondelegation challenge" to the Clean Air Act. *See id.* at 1057, 1058 (Tatel, J., dissenting in part) (citing *South Terminal Corp.* v. *EPA*, 504 F.2d 646 (1st Cir. 1974)).

The disagreements deepened in the several opinions issued upon resolution of EPA's petition for rehearing and rehearing en banc. The panel majority observed that "the approach of the *Benzene* case, in which the Supreme Court itself identified an intelligible principle in an ambiguous statute, has given way to the approach of *Chevron*," 195 F.3d at 8, under which the *agency* may come up with intelligible principles not found in the statute itself. Judge Silberman dissented from denial of rehearing en banc, arguing that the panel's remand to the agency for it to devise a limiting principle "undermines the purpose of the nondelegation doctrine"—"to ensure that *Congress* makes the crucial policy choices that are carried into law." *Id.* at 15 (emphasis added). Judge Tatel, joined by two other judges, also dissented. He found the debate about the proper remedy once an illegitimate delegation is identified to have "no relevance to the constitutional question we face" because, in his view, the statutory standards at issue are "far more specific than

the sweeping statutory delegations consistently upheld by the Supreme Court for more than sixty years." *Id.* at 16.

The cacophony of opinions in the D.C. Circuit—not to mention the circuit conflict over Section 5 and the confusion evidenced in other court of appeals decisions[8]—are an unavoidable result of this Court's own ambivalent approach to the nondelegation doctrine since 1935, under which "the boundaries limiting the scope of congressional delegation to the executive branch remain only dimly perceivable." *Id.* at 14 (Silberman, J., dissenting from denial of rehearing en banc). Guidance is needed from this Court on this fundamental separation of powers principle.

5. This case is an ideal vehicle for providing such guidance. The Tenth Circuit below held that "the statute itself" provides the constitutionally required guidance for Executive action. App. 18a n.8. The statute, however, contains no limiting principle whatever to guide the Secretary's exercise of power, providing instead that the acquisitions it authorizes are "in his discretion." The only proviso is that they be "for Indians," but—as the Eighth Circuit held and experience has shown—that is no practical limitation at all on the Secretary's exercise of "discretion" in determining what types of property to acquire under Section 5.

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[8] *See, e.g., Terran* v. *Secretary of Health & Human Servs.*, 195 F.3d 1302, 1314-15 (Fed. Cir. 1999) (rejecting application of doctrine); *id.* at 1321 n.1 (Plager, J., dissenting) (declining to join majority discussion of "the more difficult question of whether the statute as written complies with the minimum requirements for a valid delegation of legislative power"); *Stupak-Thrall* v. *United States*, 89 F.3d 1269, 1283 n.17 (6th Cir. 1996) (Boggs, J., dissenting from denial of rehearing en banc) ("the concerns about democratic legitimacy behind the non-delegation doctrine have not disappeared"); *id.* at 1300 (doctrine "may be largely dead, or barely breathing, but it is not totally dead"), *cert. denied*, 519 U.S. 1090 (1997).

Moreover, as it applies to this case and to thousands of earlier acquisitions, the broad delegation in Section 5 is unadorned by any administrative effort to establish principles to limn this uncabined discretion; the property here was acquired long before the Secretary passed any regulations under Section 5.[9] This case, accordingly, presents a direct challenge to the breadth of the statutory delegation.

Nor does the context in which Section 5 operates provide any basis for concluding that Congress would somehow be unable to enact limiting principles due to complexity or expertise. Instead, the raw authority granted here could readily have been exercised or cabined by Congress. *Cf. Mistretta*, 488 U.S. at 372 (nondelegation "jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives"); *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 145 (1941).

In short, there are no special factors at work in this case that would prevent the Court from considering the basic question of the continuing vitality of the nondelegation doctrine. Given the confusion over the doctrine's role in

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[9] The existence of regulations is in any event no answer to the nondelegation problem. One of the "important functions" served by the doctrine is to "ensure[] * * * that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Benzene*, 448 U.S. at 685 (Rehnquist, J., concurring in the judgment). Relying on an *agency* effort to make those determinations "undermines the purpose of the nondelegation doctrine." *ATA*, 195 F.3d at 15 (Silberman, J., dissenting from denial of rehearing en banc). Thus, when there are no intelligible principles to be found in the statute itself, the doctrine requires invalidation of the statute, rather than reliance on an *Executive* action. *See id.*

separation of powers jurisprudence, the widespread use of the specific authority at issue here, and the significant consequences that flow from its exercise—including, as here, the establishment of federal criminal jurisdiction—this Court should grant review to consider the recurring and important issues surrounding the nondelegation doctrine.

II. THE COURT SHOULD RESOLVE THE CONFLICT AND CONFUSION OVER THE INDIAN COUNTRY STATUS OF OFF-RESERVATION PROPERTY ACQUIRED BY THE SECRETARY PURSUANT TO SECTION 5.

1. This case presents a second issue on which the lower courts also need guidance: if the delegation in Section 5 passes constitutional muster, is the Secretary's standardless decision to acquire off-reservation property for the United States to hold in trust for Indians sufficient—standing alone—to transform the property into "Indian country" within the meaning of Section 1151? The federal circuits are divided on this important jurisdictional issue, and the Tenth Circuit decision below answering this question in the affirmative conflicts with the intent of Congress, as well as with this Court's own precedents.

2.a. Congress—which has plenary authority over Indian affairs, *see* U.S. Const. art. I, § 8, cl. 3—has the first and final say over what is Indian country. *See Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 534 (1998) ("Whether the concept of Indian country should be modified is a question entirely for Congress."); *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913) (United States' dealings with Indians "are to be determined by Congress, and not the courts"). In exercising this authority, Congress has codified three categories of Indian

country: (a) "Indian reservation[s]"; (b) "dependent Indian communities"; and (c) "Indian allotments." 18 U.S.C. § 1151.[10]

As is evident from the text of the statute, "Section 1151 of 18 U.S.C. does not directly address the status of tribal trust lands located outside Indian reservations, unless the lands are used for the residence of a dependent Indian community." Cohen, *supra*, at 45. Nor does Section 5 of the Indian Reorganization Act; it gives the Secretary carte blanche to acquire property in trust for Indians, and provides that such land "shall be exempt from State and local taxation," 25 U.S.C. § 465, but it is silent as to the property's Indian country status under Section 1151. As a result, "the Indian country status of trust lands located outside reservation boundaries is"—as the leading commentator has put it—"uncertain." Cohen, *supra*, at 45.

b. The federal circuits have added to the uncertainty by issuing conflicting rulings on this basic jurisdictional question. In *United States* v. *Stands*, 105 F.3d 1565, 1572 & n.3 (8th Cir.), *cert. denied*, 522 U.S. 841 (1997) (emphasis added), for example, the Eighth Circuit held that "[f]or jurisdictional purposes, tribal trust land beyond the boundaries of a reservation [acquired pursuant to Section 5] is ordinarily *not* Indian country."[11] Other circuits, however, have taken the

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[10] Most Indian country has been expressly designated by Congress as an Indian reservation (§ 1151(a)) or allotment (§ 1151(c)). *See* Felix S. Cohen, *Handbook of Federal Indian Law* 28 (1982). In *Venetie*, 522 U.S. at 528-530, this Court held that Section 1151(b) was intended to codify its prior decisions in *United States* v. *Sandoval*, *supra* (Pueblo Indian communities are Indian country), and *United States* v. *McGowan*, 302 U.S. 535 (1938) (Reno Indian Colony is Indian country), which involved lands that were "like Indian reservations generally." 522 U.S. at 529. As such, the dependent Indian community category of Section 1151(b) is—as *Venetie* recognizes—a "limited" one. *Id.* at 527.

[11] The *Stands* court noted that "[i]n some circumstances, off-reservation tribal trust land may be considered Indian country," but none of the circumstances it identified are implicated here. 105 F.3d at 1572 n.3.

opposite position. *See, e.g.*, *Penobscot Indian Nation* v. *Key Bank of Maine*, 112 F.3d 538, 547 n.12 (1st Cir.) (tribal trust land ordinarily is Indian country), *cert. denied*, 522 U.S. 913 (1997); *Narragansett Indian Tribe* v. *Narragansett Elec. Co.*, 89 F.3d 908, 920 (1st Cir. 1996) (same); *Langley* v. *Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985) ("whether lands are merely held in trust for the Indians or whether the lands have been officially been proclaimed a reservation, the lands are clearly Indian country").[12]

While acknowledging the directly contrary position adopted by the Eighth Circuit in *Stands*, the Tenth Circuit below held that "lands owned by the federal government in trust for Indian tribes *are* Indian Country pursuant to 18 U.S.C. § 1151." App. 7a & n.2 (emphasis added). *See also Buzzard* v. *Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir.) (tribal trust land ordinarily meets Indian country test), *cert. denied*, 510 U.S. 994 (1993). In so holding, the Tenth Circuit refused "to affix" any "categorical label" to the property at issue in this case under Section 1151. App. 11a.

c. In addition to deepening the circuit conflict over the Indian country status of off-reservation trust land, the Tenth Circuit's Indian country analysis conflicts with the statutory scheme, as well as with this Court's precedents. As is plain

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The first is where the trust land is a "de facto reservation or dependent Indian community." *Id.* The other "situation in which tribal trust land may be considered Indian country" is where it is an "allotment * * * transferred to the United States in trust for a tribe" and, thus, "still an allotment" covered by Section 1151(c). *Id.* at 1572 n.5. In other words, according to the Eighth Circuit, tribal trust land may be Indian country when it fits into one of the existing categories of Section 1151.

[12] The BIA has apparently sided with those circuits that treat off-reservation trust property as Indian country. *See* 64 Fed. Reg. at 17578 ("[I]f land were taken in trust by the Secretary, such trust land would then qualify as Indian country and [the tribe occupying it] would have all the powers that pertain within Indian country.").

from the text of Section 1151, "Indian country exists * * * *only if* the land in question" fits into one of the three categories codified in Section 1151—"Indian reservations," "dependent Indian communities," and "allotments." *Venetie*, 522 U.S. at 527 n.2, 530 (emphasis added). *See also United States* v. *John*, 437 U.S. 634, 648 & n.17 (1978) (Indian country determination depends on whether property in question fits within one of the "three categories of land" codified in Section 1151). Courts "are not free" to create a *fourth* category for lands held in trust by the United States that do not qualify under the terms of Section 1151. *Venetie*, 522 U.S. at 534.

Astonishingly, in this case even the United States concedes that the property at issue does not fit within any of the categories codified by Section 1151. *See* U.S. Resp. Br. in *United States* v. *Roberts*, No. 98-7057 (10th Cir.), at 20 ("The portions of appellant's brief dealing with reservations, dependent Indian communities and allotments are not discussed herein because such arguments and authorities are inapplicable to this case. *The government has never argued that the tribal complex is part of a reservation, dependent Indian community or allotment.*") (emphasis added). That concession—which admittedly was made before this Court's decision in *Venetie*—alone compels the conclusion that the property at issue is not Indian country within Section 1151 and, thus, not Indian country period. *See Venetie*, 522 U.S. at 527 & n.2, 526. But far from so holding, the Tenth Circuit embraced the government's *ultra vires* approach to the Indian country determination, and held that the property at issue was Indian country without bothering "to affix" any "categorical label" to it under Section 1151. App. 11a.

To the extent the Tenth Circuit attempted to fill the void by suggesting that the property is something between an "informal reservation[]" and "dependent Indian communit[y]," *see id.*, its decision also plainly conflicts with this Court's precedent. *Venetie* makes clear that the

dependent Indian community category of Section 1151(b) was intended to cover lands that amount to informal reservations under this Court's prior cases and, thus, are "like Indian reservations generally." 522 U.S. at 529. *See also id.* at 527 (Section 1151(b) "refers to a limited category of Indian lands that are neither reservations nor allotments"). In concluding that both "informal" reservations and "dependent Indian communities * * * continue to exist under [Section 1151] and Supreme Court jurisprudence," the Tenth Circuit missed one of the central teachings of *Venetie*.[13]

Like most if not all off-reservation trust property, the property at issue in this case is not a reservation, and it is not a dependent Indian community either. Indeed, Section 1151(b) expressly requires that the property at issue be an "Indian community." That textual predicate was present in *Venetie*, *see id.* at 523 (land at issue was "home to the Neets'aii Gwich'in Indians"), *McGowan* (Reno Indian colony), and *Sandoval* (Pueblo Indian communities), but it is clearly absent

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[13] The Tenth Circuit relied on dicta in *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 453 n.2 (1995), and *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993), that Indian country includes "formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." *See* App. 6a-7a. But that dicta must be read in light of *Venetie*, which makes clear that what the Court previously has referred to as "informal reservations" are in fact dependent Indian communities under Section 1151(b).

The Tenth Circuit also relied on the fact that "the IRA authorizes the Secretary to acquire lands in trust for tribes, and contemplates the Secretary may officially declare them to be reservations." App. 10a (citing 25 U.S.C. § 467). But as Professor Cohen has explained, "[a]ny implication that lands purchased for tribes under section 5 of the IRA would constitute a reservation is *negated* by section 7 of that Act, 25 U.S.C. § 467, which authorizes the Secretary to proclaim lands purchased under section 5 to be a reservation." Cohen, *supra*, at 45 n.158 (emphasis added).

here. *See Webster's New College Dictionary* 227 (1995) ("community" is "[a] group of people residing in the same locality and under the same government"). Indians do not reside in the building complex at issue here or make their homes there; they—along with non-Indians who operate a local historical association and museum in the same offices—simply perform various administrative tasks there. *See* App. 4a-5a. The fact that the building complex was placed in trust pursuant to Section 5 does not transform it into something it is not—a "dependent Indian community."[14]

Of course, it is precisely because the property at issue—as the government conceded—defies characterization under any of the categories codified in Section 1151 that the Tenth Circuit was unable "to affix" a "categorical label" to it. App.11a.

3. While the Tenth Circuit decision clearly conflicts with the statutory scheme and decisions discussed above, this Court has never squarely addressed the Indian country status of off-reservation trust property, and the fact that it has not done so reinforces the need for guidance here. Generally speaking, in those instances in which the Court has held that tribal trust land is Indian country, the property also qualified as either a reservation, *e.g.*, *John*, 437 U.S. at 649; dependent Indian community, *e.g.*, *McGowan*, 302 U.S. at 538; or allotment, *e.g.*, *United States* v. *Pelican*, 232 U.S. 442, 449 (1914). That is not the case, however, with respect to a great deal of property held in trust by the United States for Indians —including the building complex here. In holding that off-reservation trust land is necessarily Indian country within Section 1151, the Tenth Circuit below and other courts have

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[14] In his treatise, Professor Cohen suggested that off-reservation tribal trust lands might constitute Indian country under the "dependent Indian community" category of Section 1151 when such lands are "actually used for *tribal residence* under federal supervision." Cohen, *supra*, at 45 n.158 (emphasis added). That is obviously not the case here.

relied on this Court's decision in *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). But *Potawatomi* is hardly dispositive.

That case involved a tribal immunity challenge to state taxation of sales at a store operated by Indians on off-reservation trust land. In concluding that tribal immunity doctrine blocked the tax, the Court observed that "*this* trust land * * * qualifies as a *reservation* for *tribal immunity purposes*." *Id.* (emphases added). Far from establishing any categorical rule that off-reservation trust land is Indian country, the *Potawatomi* Court stated that "the test for determining whether land is Indian country does *not* turn upon whether that land is denominated 'trust land' or 'reservation.'" *Id.* at 511 (emphasis added). Moreover, because *Potawatomi* involved a state taxation issue, the Court did not decide—and did not need to decide—the question whether Congress intended off-reservation trust land to fall within any of the Section 1151 categories; indeed, Section 5 itself provides that lands taken into trust by the Secretary are immune from state taxation. *See supra* at 15.[15]

Nevertheless, because the lower courts have read *Potawatomi*'s treatment of the trust land's status in more than one way—the Tenth Circuit below, for example, thought *Potawatomi* supported the conclusion that off-reservation trust land is Indian country with Section 1151, whereas the Eighth Circuit in *Stands* was not at all deterred by *Potawatami* in reaching the opposite conclusion—the

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[15] In addition, the land in *Potawatomi* was fundamentally different than the building complex in this case: *Congress* specifically authorized the tribe to convey the land in *Potawatomi* to the United States in trust. *See* Act of Jan. 2, 1975, Pub. L. No. 93-591, 88 Stat. 1922. Accordingly, the trust land in *Potawatomi* was not subject to the vagaries of a standardless decision made pursuant to Section 5, but instead bore the imprimatur of a congressional decision that the land in question should be taken into trust.

decision has only engendered more confusion over the question presented here.[16]

4. The Court should put an end to this conflict and confusion by granting certiorari in this case and holding that off-reservation trust land acquired by the Secretary pursuant to Section 5 is not Indian country unless it fits into one of the categories established by Section 1151. That is surely the result intended by Congress.

As this Court has already recognized, Section 1151 spells out three discrete categories of Indian country, and does not include lands taken into trust by the Secretary under Section 5. Congress could easily have included such a category, but it did not do so. At the same time, in Section 5 Congress specifically provided that lands taken into trust are exempt from state and local taxation—an attribute shared by Indian

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[16] Making matters worse, in *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), the Court essentially reached the opposite result as in *Potawatomi*. *Mescalero* involved the question whether an Indian tribe was immune from state taxation for the operation of a ski resort on off-reservation land. The resort was "developed under the auspices of the Indian Reorganization Act of 1934" on land that was "leased from the United States Forest Service for a term of 30 years." 411 U.S. at 146. Although "the ski resort land was not technically 'acquired' 'in trust for the Indian tribe,'" *id.* at 155 n.11 (quoting Section 5), the Court concluded that it was on the same footing as Section 5 trust land because "it would have been meaningless for the United States, which already had title to the forest, to convey title to itself for the use of the Tribe." *Id.* (quotation omitted); *see id.* ("We think the lease arrangement here in question was sufficient to bring the Tribe's interest in the land within the immunity afforded by Section [5]."). Nevertheless, unlike the trust land in *Potawatomi*, the *Mescalero* Court held that the parcel before it was not immune from state taxation. In *Potawatomi* the Court purported to distinguish *Mescalero* on the ground that it did not involve trust property, but it did not address the Court's conclusion in *Mescalero* that the ski resort was on equal footing with trust land under Section 5. *See Potawatomi*, 498 U.S. at 511.

country—but stopped well short of saying that lands acquired under Section 5 are Indian country within Section 1151. In addition, the Indian Major Crimes Act—which establishes federal jurisdiction here—provides jurisdiction over specified offenses occurring within Indian country as codified by Section 1151, *see Negonsott* v. *Samuels*, 507 U.S. 99, 102-103 (1993), but does not refer to offenses occurring on trust lands acquired pursuant to Section 5.

As in other areas of federal Indian law, over time the lower courts have strayed from—and lost sight of—these basic textual guideposts. It is time for this Court to step in and give effect to the intent of Congress that Indian country be confined to the categories codified in Section 1151.

III. THE QUESTIONS PRESENTED ARE UNDENIABLY IMPORTANT AND RECURRING.

The importance of the first question presented is beyond cavil. The nondelegation principle is "universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field* v. *Clark*, 143 U.S. at 692. Questions over the application and state of that principle have arisen with increasing urgency in the modern regulatory state, and they are squarely raised here. The Court ought to decide whether the sort of legislative blank check penned by Section 5 is permissible under our constitutional scheme and, if so, resolve the uncertainty over what—if any—limit the nondelegation doctrine places on Congress today.

The question whether off-reservation property acquired pursuant to Section 5 is Indian country within Section 1151 is also undeniably important. As BIA recently put it, a finding that off-reservation land is Indian country results in "the establishment of a new sovereign or jurisdictional presence." 64 Fed. Reg. at 17577. *See also* Brent Eckersley,

Narragansett Indian Tribe of Rhode Island *v.* Narragansett Electric Company*: When Dependent Indian Communities Fall Within Indian Country*, 21 Am. Indian L. Rev. 193, 193 (1997) ("One of the most important, although often confusing concepts of Indian law is 'Indian country.'"). Such a finding also triggers federal jurisdiction over a host of offenses under the Indian Major Crimes Act that otherwise would remain within the exclusive province of the States.

Both issues are recurring—and will continue to recur until resolved by this Court. The confusion over the non-delegation doctrine is not going away until this Court resolves it. With the passing of the reservation and allotment eras, moreover, Indians have increasingly become involved in off-reservation activities. *See, e.g., Oklahoma Tax Comm'n* v. *Chickasaw Nation*, *supra* (retail store); *Potawatomi Tribe*, *supra* (same); *Mescalero*, *supra* (ski resort). Thousands of off-reservation properties across the country are already held in trust by the United States for Indians, and an astounding volume of requests by Indians to take lands into trust are pending. *See supra* at 14; 64 Fed. Reg. at 17580. In determining whether or not such lands are Indian country, both questions presented by this petition must be confronted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 98-7057

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HOLLIS EARL ROBERTS,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
(D.C. No. 95-CR-35-S)

Before PORFILIO, MCWILLIAMS, and BALDOCK, Circuit Judges.

PORFILIO, Circuit Judge.

On June 9, 1995, Hollis Earl Roberts was charged in the United States District Court for the Eastern District of Oklahoma with two counts of aggravated sexual abuse in violation of 18 U.S.C. § 2241; one count of sexual abuse, in violation of 18 U.S.C. § 2242, and five counts of abusive sexual contact, in violation of 18 U.S.C. § 2244. At all relevant times, Mr. Roberts was Principal Chief of the

Choctaw Nation of Oklahoma, as well as a member of the tribe, and the three victims were employees and members of the Choctaw Nation. A jury trial began on June 2, 1997, and four days later, the jury found Mr. Roberts guilty on three counts. The district court ordered Mr. Roberts detained pending sentencing, and later sentenced him to three concurrent prison terms. Mr. Roberts' motion in the district court challenging jurisdiction under 28 U.S.C. § 2255, as well as his motion with this court seeking to stay this appeal, have been denied. On appeal, Mr. Roberts argues the district court lacked subject matter jurisdiction because the alleged offenses did not occur in Indian Country; the government failed to prove an essential element of the offense, namely, that the offense occurred in Indian Country; the district court improperly admitted testimonial evidence; the prosecutor engaged in improper conduct; and the district court improperly applied the sentencing guidelines. Exercising jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, we affirm all aspects of the conviction and sentence.

I.

Mr. Roberts served as Principal Chief of the Choctaw Nation of Oklahoma for 19 years, holding "the supreme executive power of this Nation." *Constitution of the Choctaw Nation of Oklahoma*, art. VI, § 1. The Constitution further provides the Chief "shall fix and prescribe salaries and allowances for all elected or appointed officials and employees of the Choctaw Nation except the members of the Tribal Council and the Tribal Court," *id.* at art. VII, § 3, and "shall have the power to remove any official appointed by him except for members of the Tribal Court and the Tribal Council." *Id.* at art. VII, § 8. Trial testimony established the Choctaw Nation payroll was $22 million per annum; the total annual income of the tribe was $125 million; and the Chief's salary was $120,000 plus benefits in 1995.

At trial, more than ten women, all members and employees of the Choctaw Nation, described how, during his tenure as Principal Chief, Mr. Roberts forced unwanted sexual acts on them, usually in his office at the Tribal Complex. Angella Jean Gilbert, Misty Grammar, and Kobi Dawn Russ testified to specific acts of abusive sexual contact and aggravated sexual assault, and the other women testified to extrinsic acts. The defense presented seven witnesses, all tribal employees, to support the defendant's theories the women had engaged in consensual sex with Mr. Roberts or their allegations were part of a political ploy to unseat him as Principal Chief. The jury returned guilty verdicts on Count I, abusive sexual contact against Angella Jean Gilbert, in violation of 18 U.S.C. § 2244; Count II, aggravated sexual abuse against Angella Jean Gilbert, in violation of 18 U.S.C. § 2241(a)(1); and Count VI, abusive sexual contact against Kobi Dawn Russ, in violation of 18 U.S.C. § 2244; and not guilty verdicts on the other four counts.

II.

The charged conduct occurred at the Choctaw Nation Tribal Complex, a property which is owned by the United States in trust for the Choctaw Nation. The Major Crimes Act, 18 U.S.C. § 1153, confers on the United States exclusive jurisdiction over certain offenses, including those alleged against Mr. Roberts, committed in Indian Country, and the district court accordingly premised jurisdiction in this case on its finding the alleged criminal acts occurred within Indian Country. Although his counsel acknowledged at oral argument the United States owns the Tribal Complex property, Mr. Roberts contends trust status does not suffice to establish Indian Country; certain irregularities invalidated the process by which the Department of the Interior attempted to take the land into trust; and the Secretary of the Interior (Secretary) lacks authority to take this, or any land, into trust for an

Indian tribe. The district court found these arguments unpersuasive, as do we.

We review *de novo* Mr. Roberts' several challenges to the district court's exercise of jurisdiction, *see United States v. Brown*, 164 F.3d 518, 521 (10th Cir. 1998), and first consider his most fervent argument that the property's trust status does not establish Indian Country. With exceptions not relevant to this case, 18 U.S.C. § 1151 defines Indian Country as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Mr. Roberts argues here, as he did below, the Tribal Complex satisfies none of the three categorical definitions of Indian Country. Following Mr. Roberts' motion to dismiss for lack of subject matter jurisdiction, the district court held a hearing. The government presented the testimony of Tom Williams, Director of Real Estate Services for the Choctaw Nation; Glendel Rushing, Bryan County Assessor; and Mary Downing, Realty Specialist for the Bureau of Indian Affairs (BIA). Mr. Roberts presented the testimony of Dennis Springwater, Acting Deputy Area Director for the BIA. Based on their testimony, the district court derived the facts summarized here.

The Choctaw Nation Tribal Complex serves as headquarters of the Nation, and between sixty and seventy employees work there. In addition to the various administrative functions conducted at the headquarters, the Choctaw Nation

operates bingo games on the Tribal Complex property. The building is located in Durant, Oklahoma, and formerly housed the Oklahoma Presbyterian College for girls. In 1976, the property was deeded to the United States of America in trust for the Choctaw Nation of Oklahoma so long as the premises are used for the purposes of the Choctaw Nation. *See United States* v. *Roberts*, 904 F. Supp. 1262, 1264-65 (E.D. Okla. 1995) (conducting an extensive review of the chain of title). The Red River Valley Historical Association operates its headquarters and museum in buildings located at the Tribal Complex pursuant to a lease with the Choctaw Nation. Since 1976, both the BIA and Choctaw Nation have treated the property as trust land, as has the State of Oklahoma which considers it beyond the state's taxation jurisdiction and does not list it on the state ad valorem tax rolls. *See id*, Based on the evidence and the Indian Country case law, the district court held this trust land, even though not a formally declared reservation, was Indian Country. *See id.* at 1265-68. We believe the court's conclusion was well-founded in precedent.

The United States' acquisition of the Tribal Complex property in trust for the Choctaw Nation occurred pursuant to the Indian Reorganization Act (IRA) which provides, in part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments . . . for the purpose of providing land for Indians.
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> . . . .
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> Title to any lands or rights acquired pursuant to sections . . . 465 [and others] shall be taken in the name of the United States in trust for the Indian tribe or individual

> Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465. The Supreme Court has had several occasions to comment on the jurisdictional status of tribal trust land. In *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511, 111 S. Ct. 905, 910 (1991), the Supreme Court held the tribe's sovereign immunity from state taxes applied to cigarette sales on tribal trust land, even though that land did not constitute a "formally designated 'reservation.'" The Court explained:

> The State contends that the Potawatomis' cigarette sales do not, in fact, occur on a "reservation." . . . [No] precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges. . . . We [have] stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation." Rather, we ask whether the area has been "'validly set apart for the use of the Indians as such, under the superintendence of the Government.'"

Id. (citing *United States* v. *John*, 437 U.S. 634, 650, 98 S. Ct. 2451 (1978) (Major Crimes Act provides a proper basis for federal prosecution of a crime occurring on lands held in trust by the federal government for the benefit of the Mississippi Choctaw Indians))[1]; *see also Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 453 n.2, 115 S. Ct. 2214 (1995) (Oklahoma may not apply its motor fuels tax to fuel sold by the tribe in Indian Country and "'Indian country' as Congress comprehends that term, *see* 18 U.S.C. § 1151, includes formal reservations and informal reservations,

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[1] In *United States* v. *John*, 437 U.S. 634, 649, 98 S. Ct. 2451 (1978), the land in question had been proclaimed a reservation at the time of suit rendering this discussion of the status of land held in trust dicta.

dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States."); *Oklahoma Tax Comm'n* v. *Sac and Fox Nation*, 508 U.S. 114, 123, 113 S. Ct. 1985 (1993) ("Our cases make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in Indian Country. Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.").

Applying these Supreme Court cases, we believe official "reservation" status is not dispositive and lands owned by the federal government in trust for Indian tribes are Indian Country pursuant to 18 U.S.C. § 1151. *See Cheyenne-Arapaho Tribes* v. *State of Oklahoma*, 618 F.2d 665, 668 (10th Cir. 1980) (state hunting and fishing laws do not apply on trust lands located within a disestablished reservation because "lands held in trust by the United States for the Tribes are Indian Country within the meaning of § 1151(a)")[2]; *Langley* v. *Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985) (affirming the district court's exercise of federal criminal jurisdiction because "whether lands are merely held in trust for the Indians or whether the lands have been officially proclaimed a reservation, the lands are clearly Indian country"); *United States* v. *Azure*, 801 F.2d 336, 339 (8th Cir. 1986) ("Indian trust land, although not within the boundaries of the Turtle Mountain Reservation, can be classified as a de facto reservation, at least for purposes of

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[2] In *Cheyenne-Arapaho Tribes* v. *State of Oklahoma*, 618 F.2d 665, 668 (10th Cir. 1980), we observed, "the Solicitor for the Interior Department ruled that land acquired for the Cheyenne-Arapaho Tribes under the Oklahoma Indian Welfare Act had reservation status," but we did not state the Solicitor's ruling was necessary to our holding the trust lands were Indian Country.

federal criminal jurisdiction.");[3] *see also Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655, 666 (9th Cir. 1975) ("We are confident that when Congress in 1934 authorized the Secretary to purchase and hold title to lands for the purpose of providing lands for Indians, it understood and intended such lands to be held in the legal manner and condition in which trust lands were held under the applicable court decisions free of state regulation.").

In *Buzzard* v. *Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076-77 (10th Cir. 1993) (affirming the district court's decision land the United Keetoowah Band purchased and owned in fee simple with a restriction against alienation was not Indian Country), referenced by both the government and Mr. Roberts, we discussed how trust status can demonstrate both federal set aside and superintendence. Relying on the holding in *United States* v. *McGowan*, 302 U.S. 535, 539, 58 S. Ct. 286 (1938), that Reno Indian Colony had been set aside by the government for the use of Indians because it was purchased by the United States for the purpose of providing lands for needy Indians, we explained:

> Similarly, trust land is set apart for the use of Indians by the federal government because it can be obtained only by filing a request with the Secretary of the Interior, 25 C.F.R. § 151.9 (1992), who must consider, among other things, the Indian's need for the land, *id.* § 151.10(b), and the purposes for which the land will be used, *id.*

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[3] The Eighth Circuit also observed, "[i]t is well established that the actions of the federal government in its treatment of Indian land can create a de facto reservation, even though the reservation was not created by a specific treaty, statute, or executive order." *United States* v. *Azure*, 801 F.2d 336, 338 (8th Cir. 1986). The Eighth Circuit has not always followed *Azure*, although it recognizes the precedent. *See United States* v. *Stands*, 105 F.3d 1565, 1575 & n.3 (8th Cir. 1997) ("For jurisdictional purposes, tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country. . . . In some instances, off-reservation tribal trust land may be considered Indian country (citing *Azure*).").

> § 151.10(c). If the request is approved, the United States holds the land as trustee. *Id.* § 151.2(d). Thus, land is "validly set apart for the use of Indians as such" only if the federal government takes some action indicating that the land is designated for use by Indians.

Buzzard, 992 F.2d at 1076. We believed trust status could also meet *McGowan's* superintendency requirement:

> Superintendency over the land requires the active involvement of the federal government. This involvement was shown in *McGowan* by the federal government's retention of title to the land and its regulation of activities in the Colony. 302 U.S. at 538-39, 58 S. Ct. at 287-88. The United States also holds title to trust land, although only as trustee. In addition, before agreeing to acquire trust land, the Secretary must consider several factors including the authority for the transactions, *id.* § 151.10(a), the impact on the state resulting from the removal of the land from the tax rolls, *id.* § 151.10(3), and jurisdictional problems that might arise, *id.* § 151.10(f). These requirements show that, when the federal government agrees to hold land in trust, it is prepared to exert jurisdiction over the land.

Id.

Notwithstanding these Supreme Court and Tenth Circuit precedents, Mr. Roberts cites *State of Alaska* v. *Native Village of Venetie*, 522 U.S. 520, 118 S. Ct. 948 (1998), in support of his position trust lands are not Indian Country. In *Venetie*, the Court had to decide whether former reservation lands, conveyed to a Native corporation and then to the Native Village of Venetie in communal fee simple pursuant to the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601, could be considered Indian Country under 18 U.S.C. § 1151, thereby permitting the tribe to tax non-Indians doing business on the lands. *See id.* at 951-52. Because the lands were neither a reservation nor allotment, the question

was whether they constituted a dependent Indian community. *See id.* at 953. The Court announced for the first time a two-part test for dependent Indian community, stating, "[we] must . . . conclude that in enacting § 1151(b), Congress indicated that a federal set-aside and a federal superintendence requirement must be satisfied for a finding of a 'dependent Indian community.'" *Id.* at 954. According to the Court, the language of the ANCSA clearly showed Congress had no intention to set aside or superintend the lands at issue; therefore, Venetie was not a dependent Indian community. *See id.* at 955-56.

We must first observe the factual differences distinguishing *Venetie* from the present case. Whereas the Choctaw Tribal Complex is owned by the federal government in trust for the Choctaw Nation pursuant to the IRA, the disputed land in *Venetie* was owned in communal fee simple by an Indian tribe pursuant to the ANCSA. In *Venetie*, there was no possibility the lands could qualify as a reservation under 18 U.S.C. § 1151(a) because the ANCSA had explicitly abrogated its reservation status, *see id.* at 953, whereas here the IRA authorizes the Secretary to acquire lands in trust for tribes, and contemplates the Secretary may officially declare them to be reservations. *See* 25 U.S.C. § 467.[4]

Further, we find in *Venetie* neither a declaration that tribal trust lands are not Indian Country for purposes of criminal jurisdiction, nor a repudiation of the Court's prior discussions of "informal" reservations. The test Justice Thomas announced for 18 U.S.C. § 1151(b) Indian Country (dependent Indian community) in *Venetie* does correspond with the

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[4] As discussed above, however, official declaration of reservation status is not necessary for the property to be treated as Indian Country under 18 U.S.C. § 1151. Rather, as the Supreme Court has said, it is enough that the property has been validly set apart for the use of the Indians, under federal superintendence. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S. Ct. 905 (1991).

factors Chief Justice Rehnquist articulated in *Potawatomi* as establishing Indian Country under 18 U.S.C. § 1151(a) (reservation) when there is no formal reservation. In both instances, the Court looked for federal set aside and superintendence. *See Venetie*, 118 S. Ct. at 953;[5] *Potawatomi*, 498 U.S. at 511. Thus, the relationship between informal reservations and dependent Indian communities is not entirely clear under current case law. But based on Justice Thomas' holding, "[dependent Indian community] refers to a limited category of Indian lands that are neither reservations nor allotments," *Venetie*, 118 S. Ct. at 953, and the Court's earlier pronouncements such as, "Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States," *Sac & Fox*, 508 U.S. at 123, we believe both dependent Indian communities and reservations, whether formal or informal, continue to exist under 18 U.S.C. § 1151 and Supreme Court jurisprudence.

We need not further expound on the Supreme Court's cases in this area because, no matter which categorical label we choose to affix, the property in this case, owned by the United States in trust for the Choctaw Nation, is Indian Country, particularly in light of the district court's findings the Tribal Complex property was validly set-aside for the tribe under the superintendence of the federal government. We will now turn to these findings as we address Mr. Rob-

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[5] Although the facts supporting "set-aside" and "superintendence" appear to be case sensitive, Justice Thomas further explained, "the federal set-aside requirement ensures that the land in question is occupied by an 'Indian community'; the federal superintendence requirement guarantees that the Indian community is sufficiently 'dependent' on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question." *See State of Alaska* v. *Native Village of Venetie*, 522 U.S. 520, 118 S. Ct. 948, 955 (1998).

ert's contentions the trust process was improperly executed and the Secretary lacks authority to take lands into trust for tribes.

As the district court noted, when trust land is acquired, the federal government must take "some action indicating that the land is designated for use by Indians." *Roberts*, 904 F. Supp. at 1266 (citing *Buzzard*, 992 F.2d at 1076). In *Buzzard*, we outlined the procedure the Secretary uses to acquire land in trust. Although the regulations discussed in *Buzzard* were not in effect in 1976 when the federal government acquired the Tribal Complex property in trust for the Choctaw Nation, the testimony of Mary Downing, Realty Specialist for the BIA[6] revealed that in 1976 the BIA followed substantially the same procedures as those currently codified at 25 C.F.R. §§ 151.1-151.14. *See Roberts*, 904 F. Supp. at 1268. Claiming the government failed to follow even the informal procedures when the Tribal Complex property was purchased in trust in 1976, Mr. Roberts points to various deficiencies—for example, the transaction was approved after the deed had been executed and filed of record, the approved warranty deed was never filed and returned to the BIA, and the transaction was completed before the BIA ordered a title opinion.

The district court, however, engaged in a detailed review of the process by which the land was tāken into trust, and found:

> On August 8, 1976, the Superintendent for the Talihina office of the BIA received a request from the Chief of the Choctaw Nation to accept the tribal complex property in trust. Enclosed with this request were a current abstract, a title opinion from a private attorney, a contract for sale

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[6] Springwater testified that in 1976 there were no procedures for taking land in trust. He stated the Area Director had "pretty broad discretionary authority."

> and proposed lease, the Choctaw Nation's statement of the reasons for the acquisition, and other documents related to the transaction. These documents, as well as a title opinion from the field solicitor, were forwarded to the Area Director, who approved the purchase of the tribal complex property in trust for the Choctaw Nation on August 25, 1976.

Id. The court also agreed with the government, "it is doubtful that informal policies or procedures confer substantive rights which may be enforced by defendants in criminal actions." *Id.* at 1268 n.8 (citing *United States* v. *Thompson*, 579 F.2d 1184, 1189 (10th Cir. 1978) (*en banc*) (Justice Department's *Petite* policy regarding no federal prosecution following a state prosecution for same transaction is a "housekeeping" provision that is at most a guide for federal prosecutors and it does not confer an enforceable right upon a criminal defendant)).[7] Therefore, "[e]ven assuming that strict compliance

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[7] The district court further supported its rejection of Mr. Roberts' compliance argument with *State of Florida Dep't of Business Regulation* v. *United States Dep't of Interior*, 768 F.2d 1248, 1252-57 (11th Cir. 1985) ("the decision to acquire land is one within the Secretary's discretion," and neither the statute nor regulations provided law on which the court could base review of the decision), a case which we have since expressly rejected. *See McAlpine* v. *United States*, 112 F.3d 1429, 1433-35 (10th Cir. 1997). In *McAlpine*, we held the regulations "provide 'law to apply' in evaluating the Secretary's exercise of his discretion. . . . While the regulation [25 C.F.R. § 151.10] does not provide guidance on how the Secretary is to 'weigh' or 'balance' the factors, it does provide a list of objective criteria that the decisionmaker is required to consider in evaluating trust land acquisition requests." *Id.* at 1434. We also left open the possibility the statute itself provided for judicial review. *See id.* at 1432 & n.3. Pursuant to the Administrative Procedure Act, 5 U.S.C. § 702, therefore, "the proper standard for reviewing an agency's discretionary action, such as the Secretary's decision in this case, is to determine whether the agency acted in a manner that was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* at 1436. While we note *McAlpine* expressly rejects *Florida*, it does not change the outcome in this case because, at the time of the transaction, the formal regulations now governing trust acquisitions under 25 U.S.C. § 465 did not exist. Further, we have already indicated our agreement

with informal policies and procedures was necessary for a valid acquisition of trust property, and Roberts' standing to assert such compliance argument, the testimony at the hearing thus revealed that the federal government substantially complied with the applicable policies and procedures." *Id.* at 1268. As a result, the Secretary and his delegates acquired the property for the United States in trust for the Choctaw Nation.

Beyond procedural validity, the government's actions in 1976 demonstrated its intent to treat the property as Indian Country:

> *[The government's actions] provided concrete evidence of the active involvement of the federal government in designating the tribal complex property as property for the use of the Choctaw Nation under the superintendence of the federal government.* Evidence of post-execution approval by the Area Director and a failure to file and return the approved deed constitute only incidental non-compliance with procedures not affecting the validity of an otherwise proper designation of trust property.

Roberts, 904 F. Supp. at 1268 (emphasis added). Unlike *Buzzard*, for example, where the government had taken no action to set aside the land, and the tribe unilaterally acquired and owned the land in fee simple like any other property owner, *see* 992 F.2d at 1076, here the Secretary followed procedures, albeit informal at the time, to acquire the property for the government in trust for the Choctaw Nation. *See Roberts*, 904 F. Supp. at 1267-68. Further, in *Buzzard*, there was no federal superintendence:

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with the district court the Secretary substantially complied with the informal procedures and, in any event, it is unlikely the informal procedures in place in 1976 create substantive rights enforceable by Mr. Roberts.

> [T]he federal government has not retained title to this land or indicated that it is prepared to exert jurisdiction over this land. At most it has agreed to approve transactions disposing the land. But the ability to veto a sale does not require the sort of active involvement that can be described as superintendence of the land.

992 F.2d at 1076. Here, the United States retains title to the property; the state considers the property to be beyond its taxation jurisdiction; the BIA Area Director approved the land acquisition; the government continues to oversee the Tribal Complex property, as when it participated in a 1991 lease dispute between the Choctaw Nation and the Historical Association; and the BIA and Choctaw Nation treat the Complex as trust property. *See Roberts*, 904 F. Supp. at 1265-67. For all of these reasons, we agree with the district court the property in the present case is, unlike the land in *Buzzard*, Indian Country.

Mr. Roberts next argues that the future interest held by the Chamber of Commerce operates to defeat the trust status designation of the property. The warranty deed which conveyed title to the United States in trust for the Choctaw Nation contains a provision that title to the subject property is conveyed only for "so long as said premises are used for purposes of the Choctaw Nation of Oklahoma." Further:

> In the event the property is no longer used by the Choctaw Nation and upon the filing of a Declaration by the Secretary of the Interior that said premises are no longer used by Choctaw Nation, the title shall revert to the Chamber of Commerce of the City of Durant to hold title in trust for the use and benefit of the Red River Valley Historical Society or other designee of the Chamber of Commerce of the City of Durant.

Mr. Roberts claims this future interest prevents the United States from exerting superintending control or jurisdiction over the Tribal Complex property. In support of this

argument, Mr. Roberts again relies on *Buzzard*. While *Buzzard* reaffirmed the well-settled rule that "Indian country includes . . . land held in trust by the United States for the use of an Indian tribe," *id.* at 1076 (citing *Potawatomi*, 498 U.S. at 511), the case has no bearing on the future interest contained in the warranty deed in this case. Moreover, we completely agree with the district court, "the inclusion of a future interest which allows the Chamber of Commerce to take title to the tribal complex property upon the fulfillment of a contingency does not alter the trust status of the property." *Roberts*, 904 F. Supp. at 1267.

> By its very wording, this future interest is contingent in nature—contingent on the land not being used by the Choctaw Nation and contingent on the filing of a declaration by the Secretary of Interior that the premises are not being used by the Choctaw Nation—and it cannot operate to defeat an otherwise valid exercise of superintending responsibility by the federal government as established by its approval of an acquisition in trust for the benefit of the Choctaw Nation. *The proper focus is on the federal government's superintending role and actions, not on the existence of a contingent property interest possessed by a third party. Any de minimus effect this future interest may have on the federal government's fee ownership in trust is more than overcome by the federal government's undeniable supervisory role as evidenced by the Area Director's approval of the acquisition, the federal government's continued oversight of the tribal complex property, i.e, participation in the 1991 lease dispute between the Choctaw Nation and the Historical Association, and the continued treatment of the tribal complex property as trust property by the BIA and the Choctaw Nation.*

Id. (emphasis added). For all of these reasons the district court appropriately "reject[ed] Mr. Roberts' tortuous interpretation of *Buzzard* and f[ound] that the inclusion of the

subject future interest on behalf of the Chamber of Commerce does not defeat the trust status of the tribal complex property, title to which is held by the United States in trust for the Choctaw Nation." *Id.*

Mr. Roberts finally argues the Secretary of the Interior lacks authority to take tribal lands into trust as a general matter because 25 U.S.C. § 465 unconstitutionally delegates standardless authority to the Secretary. The statute provides:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.
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> For the acquisition of such lands . . . , there is authorized to be appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation . . . in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation . . . becomes law.
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> . . . .
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> Title to any lands or rights acquired pursuant to [the various sections] of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465. Mr. Roberts cites in support of his constitutional argument, *South Dakota* v. *United States Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995). In *South Dakota*, the Eighth Circuit held the section of the IRA authorizing the Secretary to acquire land in trust for Indians unconstitutional

because it violated the nondelegation doctrine by providing no legislative standards governing the Secretary's acquisition, and therefore the Secretary lacked authority to acquire land in trust for the tribe. *Id.* at 885. However, the Supreme Court vacated that decision in *United States Dep't of the Interior* v. *South Dakota*, 519 U.S. 919, 117 S. Ct. 286 (1996) (granting certiorari, vacating and remanding to the Secretary of the Interior for reconsideration of his administrative decision); thus it has no precedential value to us.[8]

The Supreme Court did not publish a majority opinion when it granted, vacated and remanded *South Dakota*; thus, we do not know the Court's reasoning on the issue of 25 U.S.C. § 465's standards. However, we have previously acknowledged the statute itself places limits on the Secretary's discretion. *See McAlpine*, 112 F.3d at 1432 n. 3 (citing *South Dakota*, 69 F.3d at 887-88 (Murphy, J. dissenting)). For our discussion, it is helpful to recall the statutory standards observed by Judge Murphy. For example, the statute provides any land must be acquired for Indians as defined in 25 U.S.C. § 479 and funds appropriated for the acquisitions may not be used to provide land for Navajos outside their reservation boundaries. *See South Dakota*, 69 F.3d at 887-88 (Murphy, J., dissenting). And, the legislative history identifies goals of "rehabilitating the Indian's economic life" and "developing the initiative destroyed by . . . oppression and paternalism," of the prior allotment policy and indicates the

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[8] In the alternative, Mr. Roberts argues even if the trust process can now survive a delegation challenge, it is only by virtue of the regulations enacted in 1980, and subsequently amended, which place additional limits on the Secretary's discretion and facilitate judicial review. *Cf. McAlpine*, 112 F.3d at 1432 n.3 (discussing amended regulations). He believes the process remained constitutionally flawed in 1976 when the Tribal Complex property was taken into trust. While his position finds some support in Justice Scalia's dissenting opinion in *Department of the Interior* v. *South Dakota*, 519 U.S. 919, 117 S. Ct. 286, 287 (1996), we disagree based on our belief the statute itself provides standards for the Secretary's exercise of discretion.

Secretary must assure continued "beneficial use by the Indian occupant and his heirs." *Id.*[9] Mr. Roberts has not argued the Secretary abused his discretion by transgressing any of these standards.

We agree with the district court Congress properly delegated to the Secretary of the Interior authority to make such acquisitions, *see* 25 U.S.C. § 465, and the Secretary then granted a delegation of general authority to the Commissioner of Indian Affairs, *see* 39 Fed. Reg. 32166-67, who redelegated his authority to the Bureau of Indian Affairs Area Directors. *See* 34 Fed. Reg. 637-38. Consequently, "the Area Director possessed the delegated authority to take title to the tribal complex property in trust for the Choctaw Nation in 1976." *Roberts*, 904 F. Supp. at 1269.

Mr. Roberts' many arguments about the invalidity of the trust process, in this instance and in general, must finally be put to rest. In sum, we believe the Secretary properly exercised his discretion to acquire the Tribal Complex property in trust for the Choctaw Nation pursuant to 25 U.S.C. § 465, and there is evidence of federal set-aside and superintendence. We reject the delegation argument and are equally unpersuaded the Secretary's actions merit reversal. As a result, the property is Indian Country for purposes of the Major Crimes Act, and no procedural or administrative defect nullifies this status. The district court did not err in asserting jurisdiction over the alleged offenses in this case.

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[9] Moreover, the Supreme Court has only twice in its history, and not since 1935, invalidated a statute on the ground of excessive delegation of legislative authority; since 1935, the "Court has consistently upheld statutes involving broad delegations of authority." *South Dakota v. United States Dep't of the Interior*, 69 F.3d 878, 886 (8th Cir. 1995) (and citations therein) (Murphy, J., dissenting).

III.

Mr. Roberts next argues the jury, not the judge, should have decided whether the Tribal Complex was Indian Country, and, in the alternative, the evidence was insufficient to support a jury finding the offenses occurred in Indian Country. We address these arguments in turn.

The statutes under which Mr. Roberts was charged, 18 U.S.C. § 2241 (aggravated sexual abuse); 18 U.S.C. § 2242 (sexual abuse); and 18 U.S.C. § 2244 (abusive sexual contact), all require the offenses have occurred "in the special maritime and territorial jurisdiction of the United States." The Major Crimes Act provides:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, a felony under chapter 109A [sexual abuse], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title [embezzlement and theft] within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. § 1153(a). As we have already described, when Mr. Roberts moved to dismiss for lack of subject matter jurisdiction, the court held a hearing and decided the Tribal Complex, site of some of the alleged offenses, was Indian Country, and therefore the court had jurisdiction over the case. At trial, the government sought to call witnesses to prove the Indian Country status of the land, and the court disallowed the testimony, stating:

> Well, you know, we have had a hearing on that and I have found that it is Indian Country, and it was necessary that it be Indian Country before we even could - before I would even let you proceed. . . . And that's a legal issue and not a factual issue. And I will so instruct the jury.

At the close of arguments, the court instructed the jury, in part:

> The Government must prove each essential element of each offense beyond a reasonable doubt . . . .
>
> Each count requires proof of the commission of the offense within the territorial jurisdiction of the United States. In this case, the Court has determined that the Choctaw Nation Tribal Complex property located in Durant, Oklahoma, is in Indian Country, which is considered to be within the territorial jurisdiction of the United States. Consequently, no other proof or evidence is necessary to support the Government's claim that the alleged acts which allegedly took place on the Choctaw Nation's Tribal Complex property in Durant, Oklahoma, are within the territorial jurisdiction of the United States with respect to each of the counts of the indictment. The Court makes no such finding, however with respect to other locations you have heard discussed in this trial.

The court then reiterated "the defendant is charged in Counts 1, 3, 6 and 7 with abusive sexual contact in violation of 18 U.S.C. §§ 2242(1) and 2244(a)(2), which provide that *whoever in the territorial jurisdiction of the United States* engages in or causes sexual contact with or by another person by threatening or placing that other person in fear will be guilty of the offense of abusive sexual contact." (emphasis added). Instructing on the remaining counts, the court again articulated the "*whoever in the territorial jurisdiction of the United States*" requirement of 18 U.S.C. 2241(a)(1) (attempting aggravated sexual abuse) (Counts 2 and 4) and 18

U.S.C. § 2242(1) (attempted sexual abuse) (Count 5). The court also stated to the jury that it was the ultimate judge of the facts and ordered, "You must consider these instructions as a whole and not just a part of them to the exclusion of the rest."

When the instructions were proposed by the court, defense counsel objected, "There is one [instruction] . . . that refers to Indian Country where you advise the jurors that that element of the offense has been decided by the Court. And we object to that on the grounds that we regard it as a mixed question of law and fact and the material elements of the offense which the jury should have the right to adjudicate." Before the jury received the instructions, the defense renewed its Indian Country objection. The court overruled the objections.

Mr. Roberts contends the instructions relieved the government of its burden of proving an essential element of the crime by failing to provide evidence at trial the Tribal Complex was Indian Country. *See In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970) (the government must prove every element of an alleged crime beyond reasonable doubt). But the government maintains the trial court's instruction the Tribal Complex was, as a matter of law, Indian Country did not improperly remove from the province of the jury any factual inquiry. Further, the court appropriately explained the law and left the jury to determine the essential element of whether the alleged offenses occurred at the Tribal Complex.

We have previously explained, "an error in jury instructions will mandate reversal of a judgment only if the error is determined to have been prejudicial, based on a review of the record as a whole." *See Big Horn Coal Co.* v. *Commonwealth Edison Co.*, 852 F.2d 1259, 1271 n.19 (10th Cir. 1988) (citing *Durflinger* v. *Artiles*, 727 F.2d 888, 895 (10th Cir. 1984). Reviewing the entire record, we determine whether the instructions "state[d] the law which governs and

provided the jury with an ample understanding of the issues and the standards applicable." *Ramsey* v. *Culpepper*, 738 F.2d 1092, 1098 (10th Cir. 1984). We "consider all that the jury heard and, from the standpoint of the jury, decide not whether the charge was faultless in every particular but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine these issues." *Durflinger*, 727 F.2d at 895 (internal quotations omitted).

We agree with Mr. Roberts that a jury verdict, if based on an instruction allowing it to convict without properly finding the facts supporting each element of the crime, is error, *see Sandstrom* v. *Montana*, 442 U.S. 510, 523, 99 S. Ct. 2450 (1979), and the facts essential to conviction must be proven beyond the jury's reasonable doubt, not the court's. *See Connecticut* v. *Johnson*, 460 U.S. 73, 86, 103 S. Ct. 969 (1983). However, we believe Mr. Roberts confuses the legal issue of jurisdiction with the factual question of locus of the offense.

As a general matter, the trial court decides the jurisdictional status of a particular property or area and then leaves to the jury the factual determination of whether the alleged crime occurred at the site. *See United States* v. *Hernandez-Fundora*, 58 F.3d 802, 812 (2d Cir. 1995) (district court may determine a federal prison falls within the special maritime and territorial jurisdiction of the United States and remove that matter from the jury); *United States* v. *Warren*, 984 F.2d 325, 327 (9th Cir. 1993) (district court may determine a military base satisfies federal jurisdictional requirements); *United States* v. *Bridges*, 43 F.3d 1468 (table), 1994 WL 687301, *1 (4th Cir. 1994) (In a trial for robbery within the special maritime and territorial jurisdiction of the United States, "it is well established that a court may determine, as a matter of law, the existence of federal jurisdiction over the

geographic area, but the locus of the offense within that area is for the trier of fact.").

Similarly, a trial court also acts appropriately when it makes the jurisdictional ruling a particular tract of land or geographic area is Indian Country, and then instructs the jury to determine whether the alleged offense occurred there. In *United States* v. *Deon*, 656 F.2d 354 (8th Cir. 1981), the defendant challenged the jury instruction, "the Court has found as a matter of law that Pine Ridge, South Dakota, the site of the alleged offense, is in Indian Country. You are therefore instructed that this Court's jurisdiction has been established." *Id.* at 357. The Eighth Circuit held:

> The jury was not told, as a matter of law that an offense had occurred, only that the site of the alleged offense, Pine Ridge, South Dakota, was in Indian Country. This instruction, reduced to its essentials, finds as a matter of law only that Pine Ridge is in Indian country.

Id. Similarly, in *United States* v. *Sohappy*, 770 F.2d 816 (9th Cir. 1985), the Ninth Circuit reviewed the trial court's instruction the jury determine whether violations of Lacey Act prohibitions against transporting, selling, or acquiring fish taken in violation of tribal law occurred at two sites. *Id.* at 822. Because "the issue of what constitutes Indian country is a matter for the judge and not the jury," and the trial judge "was apparently satisfied the two sites were Indian country," there was no plain error in instructing the jury only that it must find whether the violations occurred at the sites. *Id.* at 822 & n.6. In *United States* v. *Cook*, 922 F.2d 1026 (2d Cir. 1991), an appeal from conviction for criminal use and possession of gambling devices, the defendants challenged the court's ruling from the bench a certain area was Indian Country. *Id.* at 1031-32. The Second Circuit held, "the question of whether the St. Regis territory is Indian country was one properly decided by [the trial] [j]udge . . . without submission of the issue to the jury." *Id.*

Several circuits have had the opportunity to state, in dicta, the trial court should *not* submit to the jury the question of whether a particular tract of land or geographic area is Indian Country. In *United States* v. *Stands*, 105 F.3d 1565 (8th Cir. 1997), the defendant argued the court had erroneously required the jury to determine whether the alleged site was Indian Country when it convicted him of charges arising out of a kidnaping and assault. *See id.* at 1575-76. The court agreed, "given a particular piece of land, it is for the court, not the jury, to determine whether that land is in Indian country." *Id.* at 1575. Therefore, "[i]t may have been error [albeit nonreversible] for the District Court to submit to the jury the narrow question of whether the alleged site of the offense was Indian country." *Id.* at 1576. Similarly, in *United States* v. *Levesque*, 681 F.2d 75 (1st Cir. 1982), the First Circuit considered the defendant's contention it was error to submit to the jury the question of whether or not the locus of an alleged assault was in Indian Country. *Id.* at 78. Whether the geographic area satisfied the dependent Indian community category of Indian Country, the court explained, was "a jurisdictional fact susceptible of determination without reference to any of the facts involved in determining defendants' guilt or innocence," but any error in submitting to the jury this jurisdictional question did not provide cause for reversal. *Id.*

We agree with our sister circuits the district court can find, as a matter of law, a geographic area or particular location is Indian Country, and then instruct the jury to determine factually whether the offense occurred there. In Mr. Roberts' case, the jury instructions neither diminished the government's burden of proof, nor relieved the jury of its responsibility to find all essential elements of the offenses.

Mr. Roberts argues that in any case, the jury had insufficient evidence to find the alleged offenses occurred at the Tribal Complex. We review *de novo* all evidence, both direct

and circumstantial, together with all reasonable inferences in the light most favorable to the prosecution, to determine whether a reasonable jury could find the essential elements of a crime beyond a reasonable doubt. *See United States* v. *Gonzales*, 58 F.3d 506, 508-09 (10th Cir. 1995). We also presume the jury resolved evidentiary conflicts in favor of the prosecution, and we defer to the jury's resolution. *See Messer* v. *Roberts*, 74 F.3d 1009, 1013 (10th Cir. 1996).

The jury heard numerous alleged victims and witnesses testify most of the offenses occurred in Mr. Roberts' office at the Tribal Complex; it also heard evidence about alleged offenses that may have transpired elsewhere. The jury appears to have carefully weighed the evidence in light of the judge's legal instructions on jurisdiction. On Counts I, II, and VI, alleging acts occurring at the Tribal Complex, the jury returned guilty verdicts, but on Count VII, for example, where the testimony was conflicting as to whether the incident occurred at the Tribal Complex or in Hugo, Oklahoma, the jury resolved the question in favor of the defendant. We believe the jury had sufficient evidence to make the factual determination several alleged offenses occurred at the Tribal Complex which the court had properly instructed as a matter of law to be Indian Country.

IV.

Mr. Roberts contests the district court's decision to admit, as evidence of extrinsic acts, the testimony of women who were not the victims of charged offenses. Originally the district court conducted the required balancing inquiry of Fed. R. Evid. 403, and excluded the evidence on the ground its potential prejudice substantially outweighed its probative value. In an interlocutory appeal to this court, the government challenged the exclusion.

We "remand[ed] the Fed. R. Evid. 404(b) issue concerning the nine additional women to the district court for an appropriate hearing to determine whether the government has established that Mr. Roberts engaged in a common scheme to abuse sexually women subject to his authority and whether each woman's testimony fits this pattern." *United States* v. *Roberts*, 88 F.3d 872, 875 (10th Cir. 1996).[10] We opined:

> [t]he government must produce additional information about the details of each of the nine women's proposed testimony before a firm conclusion on this issue is possible. The district court must make this determination in the first instance on remand after holding an appropriate pretrial hearing.

Id. at 881. Mr. Roberts argues the district court improperly followed our remand order, and rather took our decision as authorization to automatically admit the testimony under Rule 404(b).

On remand, the district court held an *in camera* hearing where the government presented the testimony of the three women named in the indictment and seven other women who alleged Mr. Roberts sexually abused them. The government relied on its proffer and an FBI 302 statement as to an eighth woman's testimony. Noting the evidence established a steady stream of similar conduct occurring between 1977 and 1993, the district court decided to allow testimony showing Mr. Roberts' conduct toward tribal employees under his authority was "strikingly similar" to the charged acts.

We review a decision to admit evidence under Fed. R. Evid. 404(b) for abuse of discretion. *United States* v. *Deninno*, 29 F.3d 572, 577 (10th Cir. 1994). Rule 404(b) prohibits the government from offering evidence of other

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[10] On other grounds, not relevant to this issue, *United States* v. *Roberts*, 88 F.3d 872 (10th Cir. 1996), was superceded by statute as stated in *United States* v. *Meacham*, 115 F.3d 1488 (10th Cir. 1997).

crimes, wrongs, or acts to demonstrate the bad character, moral turpitude, or criminal disposition of a defendant to prove he acted in conformity with the prior acts or events. However, the rule permits the introduction of such evidence for other approved purposes, including to demonstrate a defendant's identity or intent to commit a crime by demonstrating a common scheme or plan. *See United States* v. *McGuire*, 27 F.3d 457, 460-61 (10th Cir. 1994). Following the Supreme Court's decision in *Huddleston* v. *United States*, 485 U.S. 681, 691-92, 108 S. Ct. 1496 (1988) (outlining the four procedural safeguards governing admission decisions under Rule 404(b)), we have adopted an "inclusive approach" to admitting evidence under this rule. *United States* v. *Record*, 873 F.2d 1363, 1375 (10th Cir. 1989), 485 U.S. 681 (1988). We have listed the requirements as:

> (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; (3) the trial court must make a Rule 403 determination of whether the probative value of the similar acts is substantially outweighed by its potential for unfair prejudice; and (4) pursuant to Fed. R. Evid. 105, the trial court shall, upon request, instruct the jury that evidence of similar acts is to be considered only for the proper purpose for which it was admitted.

United States v. *Jefferson*, 925 F.2d 1242, 1258 (10th Cir. 1991); *see also United States* v. *Wacker*, 72 F.3d 1453, 1468 (10th Cir. 1995); *Huddleston*, 485 U.S. at 691-92.

Contrary to Mr. Roberts' contention, the district court did follow our order by holding a hearing, making findings about the probative value of the evidence, and excluding testimony that did not show common plan or intent. Consistent with our direction, the court issued an order evaluating the proposed testimony of seven women under Rule 404(b). The court recalled the government's rationale was to show a common scheme of sexually abusive behavior committed against female employees of the Choctaw Nation, and the

defendant's knowledge he could, by virtue of his position, abuse young female employees without fear of reprisal. It concluded "with respect to six of the . . . women, th[e] probative value of their proposed testimony is not substantially outweighed by its potential for unfair prejudice." The court made detailed findings:

> The court makes this finding as to witnesses Maddux, Ward, Byrd, McWilliams, Cole and Knight. Each witness was employed by the Choctaw Nation when the sexually abusive behavior by Roberts was directed toward them. Roberts was in a position of authority over each of them. He was the Chief of the Choctaw Nation and he represented the ultimate hiring and firing authority for the Choctaw Nation. According to the testimony, he utilized his influence and control over these women in such fashion that they were constantly subjected to his advances as part of their employment. Most, if not all of these incidents, took place with no witnesses and in areas not visible to other individuals. Each encounter was apparently prompted by a request by Roberts for a one-on-one meeting. *The testimony of these seven women regarding Roberts' conduct is strikingly similar to the testimony of the three individuals named in the indictment - Russ, Gilbert, and Grammar.*

(emphasis added). For these reasons, the court allowed the jury to hear the testimony of the six women under Rule 404(b). However, it disallowed the testimony of a seventh woman, Ms. Hughes, because:

> Hughes never worked for the Choctaw Nation and was never under the control of Roberts or subject to his authority in any respect related to employment with the Choctaw Nation. The testimony of Hughes does not fit within the stated rationale of the government in introducing such testimony to establish Roberts' scheme to

> sexually abuse those women under his authority. Consequently, Hughes' testimony is not admissible.

The court also disallowed Ms. Maddux's proposed testimony about an event that took place before she was employed by the Choctaw Nation.

We believe the district court followed our remand order and decided correctly, under *Huddleston*, *Jefferson*, and *Wacker*, the six women's testimony was admissible to show a common scheme. Addressing Mr. Roberts' contention the six women would testify to events too remote in time from the charged offenses, the court appropriately disagreed because "the testimony presented tends to establish a long-standing pattern of sexually abusive behavior on the part of Roberts from 1977 continuing up until the time of the charges contained in the indictment." *See United States* v. *Cuch*, 842 F.2d 1173, 1178 (10th Cir. 1988) (When considering the prejudicial effect of other bad acts which are temporally remote, we follow "no absolute rule regarding the number of years that can separate offenses. Rather, the court applies a reasonableness standard and examines the facts and circumstances of each case"); *see also Wacker*, 72 F.3d at 1469 (testimony showing a long-standing pattern of drug activity from the late 1970's until the time of defendants' arrest in 1990 was evidence integrally related to the charges and not too remote).

In the alternative, the government tells us the evidence was admissible under Rule 413 allowing evidence of uncharged sexual crimes for "its bearing on any matter to which it is relevant." Although we previously held that rule inapplicable to Mr. Roberts' case under its original effective date language, *see Roberts*, 88 F.3d at 875, Congress has subsequently overruled our narrow interpretation of the effective date language. *See United States* v. *Enjady*, 134 F.3d 1427,

1429-30 (10th Cir. 1998).[11] Whether under Rule 404(b) or Rule 413, therefore, the district court did not abuse its discretion in holding two evidentiary hearings consistent with our remand order and making findings supporting the admissibility of some of the women's testimony, while excluding others'.

V.

Mr. Roberts next complains that in opening and closing arguments the prosecutor improperly vouched for witness credibility and referred to evidence not in the record. Although he did not object at trial, he now contends the remarks were improper and prejudicially affected his substantial rights, therefore, amounting to prosecutorial misconduct. *See United States* v. *Eyster*, 948 F.2d 1196, 1206 (11th Cir. 1991). Where, as here, a defendant does not make a contemporaneous objection to the prosecutor's argument, the standard of review on appeal is for plain error. *See United States* v. *Russell*, 109 F.3d 1503, 1514 (10th Cir. 1997).

Mr. Roberts draws our attention to several statements:

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[11] *United States* v. *Enjady*, 134 F.3d 1427, 1429 (10th Cir. 1998), describes:

> [W]e held in *United States* v. *Roberts*, 88 F.3d 872, 879 (10th Cir. 1996), that "rule [413] was not intended to apply to criminal cases already pending as of the rule's effective date." We declined to apply Rule 413 to an indictment filed before July 1995. In September 1996 Congress responded to *Roberts*, calling it an "erroneously restrictive interpretation of the effective date language for the new rules." 142 Cong. Rec. H12051-04 (1996). Congress amended the effective date language to provide that new Rules 413- 415 "shall apply to proceedings commenced on or after the effective date of such amendments, including all trials commenced on or after the effective date of such amendments." Pub.L. No. 104-208, Div. A, Tit. I, § 101(a). Thus Congress overruled that part of *Roberts* that had narrowly interpreted the original effective date language. The purpose and effect of this amendment was for Rules 413-415 to apply to all trials commenced after July 10, 1995. Fed.R.Evid. 413(e).

(A) The prosecution's case against the defendant will center in large measure around the direct, firsthand and forth-right testimony of those courageous women, all of whom will present shockingly and strikingly similar testimony of sexual attacks committed over a number of years by this powerful and influential man, Hollis Earl Roberts.

(B) Words can't really express our appreciation for your consideration of the testimony of the ten women.

(C) If the United States Attorney's Office were after the defendant, why wouldn't we have indicted him on that charged [sic]? We had a grand jury investigation. If this was a kangaroo kind of a deal, why not charge him with it?

(D) It's tough to prove that beyond a reasonable doubt, isn't it? So what did we do? Did we go after him? Did we scour the country in 1990? No. We waited until . . . . We did nothing until more evidence was presented to the United States Attorney's Office, . . . and only then did the United States Attorney's Office move into action. There is not one piece of evidence in this case that John Raley, Linda Epperly, or Shelly Sperling has one interest whatever in intervening in the political affairs of the Choctaw Nation of Oklahoma, not one piece of evidence. He says that pretty eloquently. It sounded good, but the evidence didn't establish that.

(E) Hollis called next Monday. What did he do? He apologized, "sorry for raping you or sorry for attempting to rape you, in effect. Hollis resigned."

(F) Why were these women here - Angie Gilbert, Kobi Russ, Misty Grammar, Kathy Cole, Mary Watson, Tanya Parker, Jana Byrd, Micah Knight, Kristina Hughes, Kim Maddox, they are here for one thing. They want you to believe them.

The government responds the prosecutor's statements were proper if viewed in context. *See Darden* v. *Wainwright*, 477 U.S. 168, 179, 106 S. Ct. 2464 (1986). Statement A, the government argues, was an "appropriate prediction of testimony" borne out at trial and Statement B, "a proper prosecutorial expression of thanks to the jury for its time and attention." In Statements C and D the government explained how it had to rebut Mr. Roberts' argument the charges against him were "part of a political conspiracy masterminded by Doug Dry," and that its questioning of government witnesses revealed nothing improper in their motives for testifying. Statement E was "an accurate reflection of what Mr. Roberts, *in effect*, told [Ms. Parker]," and is supported in the record. And Statement F was "made in response to defense arguments that the testimony of the uncharged offense victims should be ignored as 'piling on' in an 'over-prosecuted case.'"

Further, the prosecutor explicitly disclaimed any ability to vouch for witness credibility, and the judge's instructions to the jury cured any error. *See Donnelly* v. *DeChristoforo*, 416 U.S. 637, 644, 94 S. Ct. 1868 (1974). In rebuttal, the prosecutor said, "I can't vouch for things that didn't appear in the record. And if anything that I say appears to be such, please discard it. If anything I say appears to be inconsistent with your honest recollection of the facts, I expect and I encourage you to follow your individual and your collective recollection of the evidence and the testimony in this case." After closing arguments, the court charged the jury, "the statements and arguments of these lawyers are not evidence." Given the context of the statements, curative instructions, and abundance of testimonial evidence on which the jury could have based its verdict, we do not believe the prosecutor's comments merit reversal of Mr. Roberts' conviction; at most, the comments were harmless error. *See United States* v. *Hasting*, 461 U.S. 499, 507-09, 103 S. Ct. 1974 (1983).

VI.

Finally, Mr. Roberts argues he should not have received a sentencing enhancement for abuse of a position of trust pursuant to U.S.S.G. § 3B1.3. We review the district court's factual findings under the clearly erroneous standard and review its applications of the Sentencing Guidelines de novo. *See United States* v. *Roberts*, 14 F.3d 502, 522-23 (10th Cir. 1993).

Based on his Criminal History Level of I, Mr. Roberts was sentenced to 26 months' imprisonment on Counts 1 and 6, served concurrently with a 135-month sentence on Count 2. The sentence included a two-level enhancement for abuse of public trust. The Guidelines provide, "if the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels." U.S.S.G. § 3B1.3 (1995). The application notes to the Guidelines further explain:

> "Public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference. Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this adjustment to apply, the position of trust must have contributed in some significant way to facilitating the commission or concealment of the offense (*e.g.*, by making the detection of the offense or the defendant's responsibility for the offense more difficult).

Id. at n.1. Mr. Roberts does not believe he abused a position of public trust. He attempts to bolster this argument with *United States* v. *Brunson*, 54 F.3d 673, 677-78 (10th Cir. 1995) (in a fraudulent, but otherwise "normal arms-length

commercial relationship," abuse of trust enhancement was improperly applied because no fiduciary or personal trust relationship existed between the two principals), and *United States* v. *Custodio*, 39 F.3d 1121, 1125-26 (10th Cir. 1994) (requiring something more than a business partnership for an abuse of a position of trust enhancement).

These cases are inapposite and do not obscure that Mr. Roberts was the longtime tribal Chief who could, and did, call subordinate female employees to his private office at the tribal headquarters where he then sexually abused them, secure in the knowledge the power and influence of his position would allow him to engage in these repeated attacks, over the course of many years, without oversight. Several women testified they did not initially report him out of fear he would use his power and influence to retaliate, either by terminating their employment, denying family members tribal benefits, or causing physical harm to them. When this case became public, family members of several victims acknowledged Mr. Roberts' behavior, but urged the women not to participate. Because she agreed to testify, at least one woman no longer has contact with her parents, and others maintain strained relationships with family members. Beyond the victims and their families, Mr. Roberts appears to have exerted significant influence over employment, economics, politics, and daily life of all members of the Choctaw Nation and the entire town of Durant, Oklahoma. As a result, even after acknowledging the abuse and assaults, many individuals were wary of supporting the victims of the offenses, and, in fact, strongly encouraged the women to maintain their silence.

The evidence clearly reveals "more than a mere showing that the victim had confidence in the defendant," *see Brunson*, 54 F.3d at 678; and "the position . . . allow[ed] him to make the wrongs more difficult to detect." *See Custodio*, 39 F.3d at 1126. We see no reason to disturb the enhancement

for abusing a position of public trust that significantly facilitated the commission or concealment of the offense.

Next Mr. Roberts argues the more lenient 1992 version of the guideline, which provides, "the position of trust must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons," U.S.S.G. § 3B1.3 n.1, should have been applied instead of the 1995 version which omitted this language. But the district court ruled the sentence enhancement applicable under either the 1992 or 1995 version of the Guidelines. *See United States* v. *Underwood*, 938 F.2d 1086, 1088 (10th Cir. 1991) ("The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence.") (quoting 18 U.S.C. § 3553(c)). We need not resolve the question of which Guideline applies if the sentence falls within either Guideline range or the sentencing judge holds the same sentence could have been imposed under either Guideline. *Cf. United States* v. *Urbanek*, 930 F.2d 1512, 1516 (10th Cir. 1991) ("Unless the district court makes it clear during the sentencing proceeding that the sentence would be the same under either of the applicable Guideline ranges, we are compelled to remand for resentencing when we find, as we do here, that an improper offense level was applied.") (following *United States* v. *Bermingham*, 855 F.2d 925, 931-35 (2d Cir. 1988) (dispute about applicable Guidelines need not be resolved where the sentence falls within either of two arguably applicable Guideline ranges and the same sentence would have been imposed under either). Finding no error, we affirm the district court's application of the enhancement for abusing a position of public trust.

VII.

We believe the district court properly premised jurisdiction on its legal conclusion the locus of the alleged criminal offenses, the Tribal Complex, was Indian Country for purposes of 18 U.S.C. § 1153. It then properly instructed the jury the Tribal Complex was Indian Country and left to the jury the factual question of whether the offenses occurred at the Tribal Complex. The district court did not misinterpret our remand instructions when it held an evidentiary hearing and admitted testimony. Finally, neither prosecutorial conduct nor sentencing merits reversal. For these reasons, we AFFIRM.

APPENDIX B

UNITED STATES DISTRICT COURT,
E.D. OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

HOLLIS EARL ROBERTS,

Defendant.

No. CR-95-35-S

Sept. 29, 1995

ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

SEAY, Chief Judge.

Defendant, Hollis Earl Roberts ("Roberts"), is charged in an eight-count indictment with five counts of abusive sexual contact in violation of 18 U.S.C. §§ 2242(1), 2244(a)(2) and 2245,[1] two counts of aggravated sexual abuse in violation of

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[1] At the time of the alleged offenses, 18 U.S.C. § 2245 contained definitional provisions applicable to the charges in the indictment. A 1994 statutory change, however, codified the former section 2245 as section 2246. The current version of section 2245 provides for the death penalty or imprisonment for any term of years or for life for sexual abuse resulting in death. On July 14, 1995, the court denied Roberts's motion to strike references to section 2245. The court found no error in the indictment's references to section 2245 as the version in effect at the times of the alleged offenses contained definitions applicable to the charged offenses. *See United States* v. *Haddock*, 956 F.2d 1534, 1542-43 (10th Cir.), *cert. denied*, 506 U.S. 828, 113 S.Ct. 88, 121 L.Ed.2d 50 (1992).

18 U.S.C. §§ 2241(a)(1) and 2245, and one count of sexual abuse in violation of 18 U.S.C. § 2242(1) and 2245. Roberts is an Indian and, at all times material to the charges in the indictment, was the Chief of the Choctaw Nation of Oklahoma ("Choctaw Nation"). The three alleged victims, Angella Jean Gilbert, Misty Grammer and Kobi Dawn Russ, are Indians and were employed by the Choctaw Nation. All offenses allegedly took place within Indian Country.

Before the court for its consideration is Roberts's motion to dismiss the indictment. On September 8, 1995, the court conducted a hearing on this matter and heard the evidence and arguments of the parties with respect to the jurisdictional issue raised by Roberts in his motion. The government presented the testimony of Tom Williams ("Williams"), Director of Real Estate Services for the Choctaw Nation; Glendel Rushing ("Rushing"), Bryan County Assessor; and Mary Downing ("Downing"), Realty Specialist for the Bureau of Indian Affairs ("BIA"). Roberts presented the testimony of Dennis Springwater ("Springwater"), Acting Deputy Area Director for the BIA.

Roberts contends all counts of the indictment should be dismissed as this court lacks subject matter jurisdiction over the alleged offenses since the alleged criminal acts did not take place within Indian Country. In response, the government contends the court's exercise of jurisdiction over the charged offenses is proper as the criminal conduct occurred at the Choctaw Nation tribal complex, the title to which is held by the United States of America in trust for the Choctaw Nation.[2] The government argues this property qualifies as Indian Country and that this court may properly exercise

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[2] Following the filing of Roberts' motion to dismiss, the government moved to dismiss Count VIII of the indictment pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure. On September 6, 1995, the court granted the government's motion. Consequently, Roberts's motion concerns Counts I through VII

jurisdiction over the charged offenses. The court agrees with the government.

I.

The facts which are necessary for a resolution of the jurisdictional issue presented by Roberts's motion are essentially undisputed. The criminal conduct outlined in the indictment allegedly occurred at the Choctaw Nation tribal complex ("tribal complex property"). The tribal complex property is located in Durant, Oklahoma, on real property more particularly described as follows:

> A part of Block 18 in West End Heights Addition to the city of Durant, described as follows: Beginning 660 feet East and 200 feet North of the SW corner of said Block 18; thence North 460 feet; thence West 310 feet; thence South 460 feet; thence East 310 feet to the point of beginning, in Bryan County, State of Oklahoma.

The tribal complex property is the headquarters of the Choctaw Nation. Between sixty and seventy employees are employed by the Choctaw Nation at the headquarters. In addition to the various administrative functions conducted at the headquarters, the Choctaw Nation operates bingo games on the tribal complex property. The Red River Valley Historical Association ("Historical Association") is also located on the tribal complex property. Pursuant to an August 6, 1976, lease agreement (Government's Exhibit No. 8) with the Choctaw Nation, the Historical Association operates its museum and headquarters in buildings located on the tribal complex property.[3]

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[3] In response to a proposed expansion by the Historical Association, the Department of Interior, the BIA, and the Choctaw Nation's attorney determined the August 6, 1976, lease agreement was invalid because it was not approved by the Secretary of Interior, or his designee, as required for leases of property held in trust for Indian tribes by the United States under 25 U.S.C. § 415 and implementing regulations found under 25

A review of the chain of title to the tribal complex property since 1975 is helpful in understanding how the Choctaw Nation came to house their headquarters and other operations on the tribal complex property. On April 28, 1975, the United States Marshal for the Eastern District of Oklahoma conveyed the tribal complex property to the Historical Association. (Government's Exhibit No. 4.) On July 19, 1976, the Historical Association conveyed the tribal complex property to the Chamber of Commerce of Durant, Oklahoma ("Chamber of Commerce"). (Government's Exhibit No. 5.) On August 8, 1976, the Chief of the Choctaw Nation requested the United States accept in trust the tribal complex property, then known as the Oklahoma Presbyterian College, located at 16th and Locust in Durant, Oklahoma. (Government's Exhibit A attached to Government's Supplemental Brief.) In connection with this request various documentation concerning the transaction was sent to the Superintendent of the Talihina office, who forward the information to the Area Director. On August 11, 1976, the Chamber of Commerce conveyed the tribal complex property to the United States of America in trust for the Choctaw Nation of Oklahoma and such conveyance was recorded with the County Clerk of Bryan County on August 12, 1976. (Government's Exhibit No. 7.) On August 25, 1976, the Area Director of the BIA executed his approval of the acquisition of the tribal complex property in the name of the United States in trust for the Choctaw Nation. (Government's

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C.F.R. Part 162, § 162.5. (Government's Exhibits Nos. 13 and 14). However, the Area Director of the BIA withdrew a demand that the Historical Association vacate the premises after Roberts informed the Area Director that he had no objection to the Historical Association continuing to use the tribal complex property. Government's Exhibit No. 15. The Area Director suggested that a new lease be negotiated with the required approval of the Secretary of Interior. Although the record is silent as to any new lease agreement, the Historical Association continues to occupy and use the tribal complex property for the operation of its museum.

Exhibit No. 10.) This executed approval was attached to the warranty deed, but the approved warranty deed was never filed of record and returned to the BIA. On August 26, 1976, the Area Director sent notification of approval to the Choctaw Nation. Since August 11, 1976, title to the tribal complex property has remained in the United States, in trust for the Choctaw Nation. Both the BIA and the Choctaw Nation have considered the tribal complex property to be trust property since the 1976 acquisition. Also, since 1976, the State of Oklahoma has considered the tribal complex property to be trust land beyond the state's taxation jurisdiction and has therefore not listed it on the state ad valorem tax rolls.

The warranty deed which conveyed title to the United States in trust for the Choctaw Nation contains a provision that title to the subject property is conveyed only for "so long as said premises are used for purposes of the Choctaw Nation of Oklahoma." The warranty deed further provides that:

> In the event the property is no longer used by the Choctaw Nation and upon the filing of a Declaration by the Secretary of the Interior that said premises are no longer used by Choctaw Nation, the title shall revert to the Chamber of Commerce of the City of Durant to hold title in trust for the use and benefit of the Red River Valley Historical Society or other designee of the Chamber of Commerce of the City of Durant.

Roberts contends the creation of this "reversionary interest"[4] in favor of the Chamber of Commerce prevents the

[4] The future interest created under the warranty deed is more appropriately labelled an "executory interest" or "contingent remainder" because it is created subject to a contingency—that the property will not be used for the purposes of the Choctaw Nation. Jesse Dukeminier and James E. Krier, Property 435 (1981). A "reversionary interest", on the other hand, is not subject to a condition precedent and "[i]t is a vested interest or estate, in as much as [the] person entitled to it has a fixed right to future enjoyment." Black's Law Dictionary 1186 (5th ed. 1979).

tribal complex property from being designated as Indian Country.

II.

Jurisdiction over the offenses charged in the indictment is premised on the government's contention that the alleged criminal acts occurred within Indian Country. With exceptions not relevant to this case, 18 U.S.C. § 1151 defines Indian Country as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The government contends that the tribal complex property qualifies as Indian Country under section 1151 because it is held in trust by the United States for the benefit of the Choctaw Nation.

The United States Supreme Court has determined that land held in trust for the benefit and use of an Indian tribe is Indian Country under section 1151. *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 511, 111 S.Ct. 905, 910, 112 L.Ed.2d 1112 (1991). In *Potawatomi*, the Supreme Court rejected the argument that Indian Country status depends upon whether the land is denominated "trust land" or "reservation" and focused on whether the land had been "'validly set apart for the use of the Indians as such, under the superintendence of the Government.'" *Id.* at 511, 111 S.Ct. at 910 (quoting *United States v. John*, 437

U.S. 634, 649, 98 S.Ct. 2541, 2549, 57 L.Ed.2d 489 (1978)). *See Oklahoma Tax Comm'n* v. *Chickasaw Nation*, ___ U.S. ___, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) (Indian Country includes tribal trust land); *Oklahoma Tax Comm'n* v. *Sac and Fox Nation*, 508 U.S. 114, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993) (presumption against state taxing authority applies to all Indian Country, not just formal reservations); *United States* v. *McGowan*, 302 U.S. 535, 538-39, 58 S.Ct. 286, 287-88, 82 L.Ed. 410 (1938) (Congressional intent, not designation of property as "reservation" or "colony", controls the determination of Indian Country status); *Indian Country, U.S.A.* v. *Oklahoma Tax Comm'n*, 829 F.2d 967, 973-76 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218, 108 S.Ct. 2870, 101 L.Ed.2d 906 (1988) (original treaty lands held by tribe under patented fee title were Indian Country even though site was not a "reservation" nor was fee title held by the United States in trust for the tribe); *Cheyenne-Arapaho Tribes* v. *State of Oklahoma*, 618 F.2d 665, 668 (10th Cir. 1980) ("lands held in trust by the United States for the Tribes are Indian Country within the meaning of § 1151(a)"); F. Cohen, Handbook of Federal Indian Law, 34 (1982 ed.) ("[T]he intent of Congress, as elucidated by [Supreme Court] decisions, was to designate as Indian Country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments.")

The tribal complex property on which the alleged criminal acts took place is clearly tribal trust property. It is undisputed that title to the tribal complex property is held by the United States in trust for the Choctaw Nation. Although Roberts concedes, as he must, that the tribal complex property is so held in trust, he argues that the future interest held by the Chamber of Commerce operates to defeat the trust status designation of the property. Roberts claims the United States does not, and is not capable of, exerting superintending control or jurisdiction over the tribal complex property

because the Choctaw Nation retains the unilateral power to control the ownership and title to the tribal complex property. This unilateral power arises from the wording of the future interest contained in the warranty deed which provides that the tribal complex property shall revert to the Chamber of Commerce if the property is not used for the purposes of the Choctaw Nation. It is claimed that this future interest prevents the tribal complex property from being designated as Indian Country.

In support of his argument, Roberts relies on *Buzzard* v. *Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir.), *cert. denied*, 510 U.S. 994, 114 S.Ct. 555, 126 L.Ed.2d 456 (1993). In *Buzzard*, the United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") purchased land and held title to such land in fee simple. The land purchased was subject to a restriction against alienation requiring the approval of the Secretary of the Interior. The Tenth Circuit determined that this land was not Indian Country and was therefore not exempt from state enforcement of tobacco taxing statutes in connection with UKB's smokeshops located on such land. In affirming the district court's determination that UKB was not entitled to injunctive relief prohibiting Oklahoma from enforcing its tobacco taxes, the Tenth Circuit determined the UKB had not established that its smokeshops were "located on land validly set apart for the UKB's use by the federal government." *Id.* at 1076. This determination was influenced by several factors—the land was not trust land, but was owned in fee simple by the UKB; no action had been taken by the federal government indicating that the land was set aside for the UKB's use; and the restriction against alienation requiring approval from the Secretary of Interior was insufficient by itself to indicate that the federal government intended the land to be set aside for the UKB's use under the superintendence of the government. *Id.* at 1076-77. The Tenth Circuit flatly rejected the UKB's argument that its land should be considered Indian Country under section 1151

because it was required, under its charter and federal law, to obtain federal government approval prior to disposing of the land. With respect to this factor concerning restriction against alienation, the Tenth Circuit held that the mere fact that the federal government had agreed to approve, or veto, transactions disposing of land did not establish the "sort of active involvement that can be described as superintendence of the land." *Id.* at 1076. Consequently, the Tenth Circuit affirmed the district court's decision that the UKB's land owned in fee simple with a restriction against alienation was not Indian Country.

Buzzard offers no support for Roberts's position. Contrary to the fee simple ownership by the UKB in *Buzzard*, the tribal complex property in this case is owned by the United States in trust for the Choctaw Nation. *Buzzard* reaffirmed the well-settled rule of law that land held in trust by the United States for the use of an Indian tribe is Indian Country under section 1151. *Id.* at 1076. The inclusion of a future interest which allows the Chamber of Commerce to take title to the tribal complex property upon the fulfillment of a contingency does not alter the trust status of the property. By its very wording, this future interest is contingent in nature—contingent on the land not being used by the Choctaw Nation and contingent on the filing of a declaration by the Secretary of Interior that the premises are not being used by the Choctaw Nation—and it cannot operate to defeat an otherwise valid exercise of superintending responsibility by the federal government as established by its approval of an acquisition in trust for the benefit of the Choctaw Nation. The proper focus is on the federal government's superintending role and actions, not on the existence of a contingent property interest possessed by a third party. Any de minimus effect this future interest may have on the federal government's fee ownership in trust is more than overcome by the federal government's undeniable supervisory role as evidenced by the Area Director's approval of the acquisition, the federal government's

continued oversight of the tribal complex property, i.e. participation in the 1991 lease dispute between the Choctaw Nation and the Historical Association, and the continued treatment of the tribal complex property as trust property by the BIA and the Choctaw Nation. Consequently, the court rejects Roberts's tortuous interpretation of *Buzzard* and finds that the inclusion of the subject future interest on behalf of the Chamber of Commerce does not defeat the trust status of the tribal complex property, title to which is held by the United States in trust for the Choctaw Nation.

III.

Roberts also questions whether the tribal complex property was validly set apart for the use of the Choctaw Nation. Roberts claims the federal government failed to comply with its internal policies and procedures for obtaining land in trust. In addition, Roberts argues that the Area Director did not have the authority to approve the acquisition and, therefore, he did not bind the federal government when he gave his written approval of the warranty deed on August 25, 1976. The court finds these arguments without merit.

When trust land is acquired, the federal government must take "some action indicating that the land is designated for use by Indians." *Buzzard*, 992 F.2d at 1076. In noting the distinction between trust land and land owned in fee simple by a tribe, the Tenth Circuit in *Buzzard* outlined the procedures followed by the federal government when it acquires land in trust. Among other factors, this process requires a tribe to seek approval of such acquisition with the Secretary, 25 C.F.R. § 151.9, an evaluation by the Secretary of the purpose for which the land will be used, 25 C.F.R. § 151.10(c), an evaluation of the statutory authority for the acquisition and any limitations contained in such authority, 25 C.F.R. § 151.10(a), an evaluation of the impact on the state resulting from the removal of the land from the tax rolls,

25 C.F.R. § 151.10(e), and an evaluation of any jurisdictional problems and potential conflicts of land use which may arise, 25 C.F.R. § 151.10(f).

Although these regulations were not in effect in 1976 when the federal government acquired the tribal complex property in trust for the Choctaw Nation,[5] the testimony of Downing revealed that in 1976 the BIA followed substantially the same procedures as those outlined in regulations currently codified at 25 C.F.R. § 151.1—151.14.[6] (Transcript at 17.) Roberts points to various deficiencies in the transaction process—the transaction was approved after the deed had been executed and filed of record, the approved warranty deed was never filed and returned to the BIA, and the transaction was complete before the BIA ordered a title opinion—and claims the federal government failed to follow the informal procedures when the tribal complex property was purchased in trust in 1976.

Even assuming that strict compliance with informal policies and procedures was necessary for a valid acquisition of trust property,[7] and Roberts's standing to assert such

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[5] The regulations codified at 25 C.F.R. § 151.11-151.14 became effective in 1980.

[6] Springwater testified that in 1976 there were no procedures for taking land in trust. He stated the Area Director had "pretty broad discretionary authority." (Transcript at 30.)

[7] The Eleventh Circuit has rejected a similar challenge to trust transactions based upon a failure to follow formal rules and regulations. In *State of Florida, Department of Business Regulation* v. *United States Department of the Interior*, 768 F.2d 1248, 1252-53 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986), the Eleventh Circuit held:

> We do not consider [the factors listed at 25 C.F.R. § 151.10] to be limits on the Secretary's authority to acquire land for the benefit of Indians. They do not purport to state for what Indian tribe the Secretary may acquire land, or how much land may be acquired, or even the circumstances under which the Secretary may use this authority. Rather they are more precisely labeled as factors to be considered in exercising

compliance argument,[8] the testimony at the hearing revealed that the federal government substantially complied with the applicable policies and procedures. On August 8, 1976, the Superintendent for the Talihina office of the BIA received a request from the Chief of the Choctaw Nation to accept the tribal complex property in trust. Enclosed with this request were a current abstract, a title opinion from a private attorney, a contract for sale and proposed lease, the Choctaw Nation's statement of the reasons for the acquisition, and other documents related to the transaction. These documents, as well as a title opinion from the field solicitor, were forwarded to the Area Director, who approved the purchase of the tribal complex property in trust for the Choctaw Nation on August 25, 1976. These actions clearly establish compliance with existing policies and procedures and, more importantly, they provide concrete evidence of the active involvement of the federal government in designating the tribal complex property as property for the use of the Choctaw Nation under the superintendence of the federal government. Evidence of post-execution approval by the Area Director and a failure to file and return the approved deed constitute

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discretion. As such, they do not constrain the Secretary's authority to acquire land in trust for Indians. We conclude therefore that appellants have failed to demonstrate that the Secretary exceeded his authority.

The Eleventh Circuit concluded that the federal government's failure to follow proper procedures in acquiring land did not mean that the land in question was not held by the United States for the benefit of the Indian tribe. *Id.* at 1253 n. 5.

[8] As argued by the government, it is doubtful that informal policies or procedures confer substantive rights which may be enforced by defendants in criminal actions. *See United States* v. *Thompson*, 579 F.2d 1184, 1189 (10th Cir.) (en banc), *cert. denied*, 439 U.S. 896, 99 S.Ct. 257, 58 L.Ed.2d 243 (1978) (Justice Department's Petite policy regarding no federal prosecution following a state prosecution for same transaction is a "housekeeping" provision that is at most a guide for federal prosecutors and it does not confer an enforceable right upon a criminal defendant).

only incidental non-compliance with procedures not affecting the validity of an otherwise proper designation of trust property. Consequently, the court rejects Roberts's contention that the tribal complex property is not Indian Country because of non-compliance with policies and procedures for the acquisition of trust property.

Roberts also contends the designation of the tribal complex property as trust property is invalid because the Area Director lacked the authority to approve the transaction. This argument merits little discussion. 25 U.S.C. § 465 vests authority in the Secretary of Interior to purchase land in trust for the purpose of providing land for Indians. In 1946, Congress authorized the Secretary of Interior to delegate his responsibilities concerning the laws governing Indian affairs:

> For the purpose of facilitating and simplifying the administration of the laws governing Indian affairs, the Secretary of the Interior is hereby authorized to delegate, from time to time, and to the extent and under such regulations as he deems proper, his powers and duties under said laws to the Commissioner of Indian affairs.... Subject to the supervision and direction of the Secretary, the Commissioner is hereby authorized to delegate, in like manner, any powers and duties so delegated to him by the Secretary, or vested in him by law, to Assistant Commissioners, or the Officer in Charge of any branch, division, office, or agency of the Bureau of Indian Affairs....

Act of August 8, 1946, ch. 907, 60 Stat. 939.

Pursuant to such delegation authority, the Secretary granted a general delegation of his authority to the Commissioner of Indian Affairs:

> 1. Delegation. . . . the Commissioner of Indian Affairs is authorized to exercise the authority of the Secretary of the Interior with respect to the management of all Indian affairs and all matters arising out of Indian relations,

> including the supervision, management, and operation of the Bureau of Indian Affairs and related activities of the Department with respect to Indian program matters.

39 Fed. Reg. 32166-67. This August 28, 1974, general delegation of authority replaced the Secretary's Order 2508 of January 11, 1949, as amended through Amendment Number 104 dated February 28, 1974, which provided authority on an item-by-item basis. *Id.* at 32166.

In 1969, the Commissioner of Indian Affairs had redelegated his authority to the Area Directors as follows:

> 3.1 Authorities from the Commissioner. The authorities of the Secretary of the Interior delegated to the Commissioner in Secretary's Order 2508 (10 BIAM 2) are hereby redelegated to the Area Directors. This redelegation also includes future authorities of the Secretary of the Interior to the Commissioner ...

34 Fed. Reg. 637-38. With respect to real property management, the redelegation to the Area Directors covered all matters except (1) the approval of leases which provide for a duration in excess of 65 years, inclusive of any provisions for extensions or renewals thereof at the option of the lessee; (2) approval of leases ceded or surplus lands unless title thereto has been restored to the tribe, or the leasing of such lands is authorized by a specific statute; and (3) approval of royalty rates other than as authorized in 25 CFR for oil, gas, and other minerals, except sand, gravel, pumice, and building stone. *Id.*

Thus, the foregoing delegations establish the Area Director's authority to approve the purchase of the tribal complex property in trust for the use of the Choctaw Nation. It is clear that the Secretary of Interior has issued a general delegation of his authority over Indian affairs to the Commissioner of Indian Affairs, who has redelegated his authority to the Area Directors. While the Area Director's authority over real

estate management is limited in certain areas concerning leases and royalty rates, it is not limited in the area of trust land purchases. Consequently, the court finds the Area Director possessed the delegated authority to take title to the tribal complex property in trust for the Choctaw Nation in 1976.

IV.

Based on the foregoing reasons, the court finds that the tribal complex property held in trust by the United States for the Choctaw Nation is Indian Country within the meaning of 18 U.S.C. § 1151. Roberts's motion to dismiss the indictment is therefore denied.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 98-7057

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HOLLIS EARL ROBERTS,

Defendant-Appellant.

ORDER
Filed September 14, 1999

Before PORFILIO, MCWILLIAMS, and BALDOCK,
Circuit Judges

Appellant's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: /s/ Deputy Clerk

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543-0001

December 2, 1999

Mr. John Roberts
Hogan & Hartson
555 Thirteenth Street
Washington, DC 20004

Re: Hollis Earl Roberts
v. United States
Application No. 99A466

Dear Mr. Roberts:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Breyer, who on December 2, 1999, extended the time to and including January 12, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SUTER, Clerk
By /s/ Sandra Elliott Spagnolo
SANDRA ELLIOTT SPAGNOLO
Assistant Clerk

APPENDIX E

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights- of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1153. Offenses committed within Indian Country

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State

in which such offense was committed as are in force at the time of such offense.

25 U.S.C. § 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Supreme Court, U.S.
FILED
APR 12 2000

No. 99-1174

In the Supreme Court of the United States

HOLLIS EARL ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General
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2699

QUESTIONS PRESENTED

1. Whether 25 U.S.C. 465, which authorizes the Secretary of the Interior to acquire interests in real property "for the purpose of providing land for Indians," is an unconstitutional delegation of legislative power.

2. Whether land acquired by the United States pursuant to 25 U.S.C. 465 and held in trust for the benefit of the Choctaw Nation is "Indian country" within the meaning of 18 U.S.C. 1151.

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In the Supreme Court of the United States

No. 99-1174

HOLLIS EARL ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 185 F.3d 1125. The opinion of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 38a-52a) is reported at 904 F. Supp. 1262.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1999. A petition for rehearing was denied on September 14, 1999 (Pet. App. 53a). On December 2, 1999, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including January 12, 2000, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Oklahoma, petitioner was convicted on one count of aggravated sexual abuse, in violation of 18 U.S.C. 2242, and two counts of abusive sexual contact, in violation of 18 U.S.C. 2244. He was sentenced to concurrent terms of imprisonment of 135 months on the Section 2242 count and 36 months on each of the Section 2244 counts. The court of appeals affirmed. Pet. App. 1a-37a.

1. Under 18 U.S.C. 1153(a), the United States has jurisdiction to prosecute specified offenses committed by Indians in "Indian country." That statutory provision, known as the "Major Crimes Act," was enacted in 1885. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385. See *United States* v. *Kagama*, 118 U.S. 375 (1886) (upholding the Major Crimes Act).[1]

The offenses specified in Section 1153 include "a felony under chapter 109A" of Title 18, such as aggravated sexual abuse (18 U.S.C. 2241), sexual abuse (18 U.S.C. 2242), and abusive sexual contact (18 U.S.C. 2244). See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 203-204 & n.14 (1978) (discussing Section 1153).

The term "Indian country" is defined in 18 U.S.C. 1151 to encompass three categories of land: "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government * * *, (b) all dependent Indian communities * * *, and (c) all Indian allotments, the Indian titles to which have not been extinguished." See *Alaska* v. *Native Village of*

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[1] The Major Crimes Act was amended in 1948 as part of the codification of the term "Indian country."

Venetie Tribal Gov't, 522 U.S. 520, 526-531 (1998) *(discussing Section 1151)*.

2. Petitioner is a member of the Choctaw Nation of Oklahoma. At the time of the events at issue in this case, petitioner was the Choctaw Nation's Principal Chief. Pet. App. 1a-2a.

In June 1995, a federal grand jury returned an indictment charging petitioner with two counts of aggravated sexual abuse, in violation of 18 U.S.C. 2241(a)(1) (Counts II and IV); one count of sexual abuse, in violation of 18 U.S.C. 2242 (Count V); and five counts of abusive sexual contact, in violation of 18 U.S.C. 2244 (Counts I, III, VI, VII, and VIII). The indictment alleged that, from at least 1990 to 1993, petitioner engaged in acts of forcible sexual relations, abusive sexual contact, and aggravated sexual assault against women who were employed by the Choctaw Nation. Pet. App. 1a-3a.

Those acts were alleged to have occurred at the Choctaw Nation Tribal Complex, which is located on land that the United States holds in trust for the Choctaw Nation. The Tribal Complex serves as the headquarters for the Choctaw Nation, and between 60 and 70 employees of the Choctaw Nation work there. The Choctaw Nation also operates bingo games at the Tribal Complex. Pet. App. 3a, 40a.

Petitioner moved to dismiss the indictment. He contended that the United States did not have jurisdiction to prosecute him because the land on which the alleged offenses occurred is not Indian country under 18 U.S.C. 1151. He argued that the land on which the Choctaw Nation Tribal Complex is located was never validly taken into trust by the Secretary of the Interior, and, in any event, that land held by the Secretary in trust for an Indian Tribe outside of a formal reservation

cannot constitute Indian country. The district court denied petitioner's motion. Pet. App. 38a-52a.

The case proceeded to trial. The jury found petitioner guilty on one count of aggravated sexual abuse (Count II) and two counts of abusive sexual contact (Counts I and VI). The jury found petitioner not guilty on four other counts. Pet. App. 3a.[2]

3. The court of appeals affirmed petitioner's convictions and sentences. The court held, *inter alia*, that the United States had jurisdiction to prosecute petitioner. Pet. App. 3a-19a.

First, the court of appeals held that the Choctaw Nation Tribal Complex, the place where petitioner's offenses occurred, is within Indian country for purposes of 18 U.S.C. 1151. Pet. App. 4a-17a. The court rejected petitioner's argument that, because the land on which the Tribal Complex is located is not within a formally recognized reservation, the land cannot constitute Indian country. The court noted that this Court has considered two criteria in determining whether lands that are not within such a formal reservation are Indian country under Section 1151: whether the lands have been "validly set apart for the use of Indians as such," and whether the lands are "under the superintendence of the [federal] Government." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); accord *Native Village of Venetie*, 522 U.S. at 527. The court concluded that the land at issue here, which the United States acquired and holds in trust for the Choctaw Nation, satisfies both criteria.

Second, the court of appeals held that the Secretary of the Interior has the authority under 25 U.S.C. 465 to

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[2] The district court dismissed one count (Count VIII) before trial on the government's motion. Gov't C.A. Br. 3.

acquire lands to be held in trust by the United States for the benefit of an Indian Tribe. Pet. App. 17a-19a. The court rejected petitioner's contention that Section 465 is an unconstitutional delegation of legislative authority. The court explained that the text and purposes of the Indian Reorganization Act, of which Section 465 is a part, provide standards to guide the Secretary's discretion: The text of the Act states that the lands are to be acquired "for Indians," and the purposes of the Act include "rehabilitating the Indian's economic life" and "developing the initiative destroyed by . . . oppression and paternalism." Pet. App. 18a.

ARGUMENT

The decision of the Tenth Circuit is correct on both questions presented by the petition. Congress, in the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, vested in the Secretary of the Interior the authority to acquire lands to be held by the United States in trust for the benefit of Indian Tribes. This Court has recognized trust lands as Indian country for purposes of 18 U.S.C. 1151, whether or not they are within the external boundaries of a formally recognized reservation. Neither aspect of the Tenth Circuit's decision conflicts with any decision of this Court or of any other court of appeals. This Court's review is therefore not warranted.

1. Petitioner urges (Pet. 9-20) the Court to resolve a purported conflict among the circuits concerning the constitutionality of 25 U.S.C. 465. But no such conflict exists. In this case, the court of appeals held that Section 465 does not violate the non-delegation doctrine.

Petitioner does not identify any extant decision that holds otherwise.[3]

a. Petitioner asserts (Pet. 13) that the decision below conflicts with the "reasoning" of the Eighth Circuit in *South Dakota* v. *United States Department of the Interior*, 69 F.3d 878 (1995). As petitioner acknowledges (Pet. 12), however, this Court granted the government's petition for a writ of certiorari in the *South Dakota* case, vacated the Eighth Circuit's judgment, and directed that the matter be remanded to the Secretary of the Interior for reconsideration of his administrative decision. *Department of the Interior* v. *South Dakota*, 519 U.S. 919 (1996); see *South Dakota* v. *United States Dep't of the Interior*, 106 F.3d 247 (8th Cir. 1996) (recalling the mandate, vacating the judgment, and remanding to the Secretary). The Eighth Circuit's "reasoning" is, consequently, not embodied in any valid judgment or decision. See *O'Connor* v. *Donaldson*, 422 U.S. 563, 577-578 n.12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect.").

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[3] As an initial matter, there is reason to question whether a defendant, in a prosecution under 18 U.S.C. 1152 or 18 U.S.C. 1153 for an offense allegedly committed on tribal trust land, should be entitled to challenge whether the land was validly taken into trust by the United States. In the Quiet Title Act, 28 U.S.C. 2409a, Congress has barred challenges to the United States' title to land held in trust for Indians. See 28 U.S.C. 2409a(a); *United States* v. *Mottaz*, 476 U.S. 834, 842-843 & n.6 (1986). Moreover, this case would be an especially inappropriate vehicle for considering the Indian country status of lands such as those at issue here, since the lands on which petitioner committed the offenses served as the seat of government for the Choctaw Nation and since petitioner was the Principal Chief of the Choctaw Nation during the time of the offenses.

This case thus does not present a circuit conflict—*i.e.*, a "conflict with the *decision* of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a) (emphasis added)—that merits this Court's review. This Court reviews "judgment[s], decree[s], or order[s]" of lower courts, not the reasoning upon which such judgments, decrees, or orders are based. 28 U.S.C. 2106. And there is no judgment of any court that rests on a holding, contrary to the Tenth Circuit's holding here, that 25 U.S.C. 465 violates the non-delegation doctrine.[4]

b. In any event, the Eighth Circuit's reasoning in its vacated *South Dakota* decision is contrary to this Court's non-delegation jurisprudence. The text, structure, and purposes of the Indian Reorganization Act of 1934, of which 25 U.S.C. 465 is a part, provide significant guidance for the Secretary of the Interior's exercise of his discretion to acquire lands to be held in trust for the benefit of Indian Tribes. Section 465 consequently is fully consistent with the non-delegation doctrine. The Tenth Circuit so recognized in this case.

It is well settled that "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby* v. *United States*, 500 U.S. 160, 165 (1991). It is "constitutionally sufficient if

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[4] Petitioner suggests (Pet. 12) that the Court vacated the judgment in *South Dakota* not because the Court disagreed with the Eighth Circuit's reasoning on the non-delegation issue, but because the Secretary of the Interior had issued new regulations governing acquisitions under Section 465. It makes no difference, however, why the Court vacated the Eighth Circuit's judgment. It is the *fact* of vacatur, for whatever reason, that renders the judgment (and therefore the reasoning) of the court of appeals in *South Dakota* without any continuing effect.

Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989) (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)).

Although "in 1935 [the Court] struck down two delegations for lack of an intelligible principle," the Court has "since upheld, without exception, delegations under standards phrased in sweeping terms." *Loving* v. *United States*, 517 U.S. 748, 771 (1996); see, *e.g.*, *Lichter* v. *United States*, 334 U.S. 742, 778-786 (1948) (upholding a statute authorizing the War Department to recover "excessive profits" earned on military contracts); *Yakus* v. *United States*, 321 U.S. 414, 420-427 (1944) (upholding a statute authorizing the Price Administrator to set prices that are "generally fair and equitable and will effectuate the purposes of [the Emergency Price Control] Act"); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943) (upholding a statute authorizing the Federal Communications Commission to regulate broadcasting according to the "public interest, convenience, or necessity").

The Court has explained that such terms "need not be tested in isolation." *American Power & Light Co.*, 329 U.S. at 104. Instead, the terms may derive content from "the purpose of the Act, its factual background and the statutory context in which they appear." *Ibid.*; see, *e.g.*, *Lichter*, 334 U.S. at 785 (in considering whether Congress had constrained the Price Administrator's discretion to recover "excessive profits," the Court considered "[t]he purpose of the Renegotiation Act and its factual background").

Congress, in the Indian Reorganization Act, provided sufficient direction to guide the Secretary of the Interior's acquisition of land under 25 U.S.C. 465.

Section 465 states that "[t]he Secretary of the Interior is hereby authorized, in his discretion, to acquire * * * any interest in lands, water rights, or surface rights to lands * * * for the purpose of providing land for Indians." It thus sets forth both the "general policy" of Congress (*i.e.*, that the federal government acquire land "for Indians") and "the public agency which is to apply it" (*i.e.*, the Secretary of the Interior and his designees). *Mistretta*, 488 U.S. at 372-373. The "boundaries of [the Secretary's] delegated authority," *ibid.*, under Section 465 may be discerned in this case, as in the cases cited above, in the purposes of the Act as a whole, its factual background, and the statutory context. *American Power & Light Co.*, 329 U.S. at 104.

Congress enacted the Indian Reorganization Act to promote Indian self-government and economic self-sufficiency. See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152-154 (1973) ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'") (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934)); accord *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974). Congress was particularly concerned with reversing the "disastrous" consequences of the General Allotment Act of 1887, ch. 119, 24 Stat. 388, which had eroded the tribal land base and weakened tribal organizations. *Hagen* v. *Utah*, 510 U.S. 399, 425 n.5 (1994).[5] Congress identified "conserv[ing] and

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[5] The General Allotment Act, together with similar legislation enacted by Congress in the late Nineteenth Century, sought to allot tribal lands to individual members and to make available any remaining lands for sale to non-Indian settlers. See *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 253-254 (1992); see also *United States* v.

develop[ing] Indian lands and resources" as one of the purposes of the Indian Reorganization Act. 48 Stat. 984 (preamble).

The purposes and history of the Indian Reorganization Act significantly inform the Secretary's exercise of his authority under Section 465. The Secretary may acquire land "for Indians," within the intent of Section 465, when the acquisition would serve such purposes as advancing tribal economic development, assisting tribal self-governance, and restoring the ancestral tribal land base. See, *e.g.*, *Mescalero Apache Tribe*, 411 U.S. at 155 & n.11, 157 (noting that the United States acted under Section 465 in making federal land available to a Tribe "for the purpose of carrying on a business enterprise").

The Secretary of the Interior has recognized that Section 465 does not confer boundless discretion. The Secretary has promulgated implementing regulations that articulate specific factors, derived from Congress's purposes in the Indian Reorganization Act and the Secretary's experience in administering it, to guide the Secretary's exercise of his discretion to take lands into trust for Tribes and individual Indians. See 25 C.F.R. Pt. 151.[6] The regulations set forth a "land acquisition policy," 25 C.F.R. 151.3, which restricts acquisitions to three circumstances: when the land is within or adjacent to an existing reservation, when the land is already owned by the Tribe, or when "the acquisition of

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Celestine, 215 U.S. 278, 290 (1909) (observing that the General Allotment Act embodied a congressional policy "which look[ed] to the breaking up of tribal relations," "put[ting] an end to tribal organization," abolishing reservations, and "establishing of the separate Indians in individual homes").

[6] The initial regulations were promulgated in 1980, after the land at issue here was taken into trust. The regulations were amended in 1996. See note 9, *infra*.

the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. 151.3(a)(1)-(3). The regulations then set forth particular factors to guide the Secretary's decision whether to acquire such land, including "[t]he need of the individual Indian or the tribe for additional land" (25 C.F.R. 151.10(b)), "[t]he purposes for which the land will be used" (25 C.F.R. 151.10(c)), and, if the land is outside a reservation and is to be used for a tribal business purpose, "the anticipated economic benefits associated with the proposed use" (25 C.F.R. 151.11(c)). By setting out ascertainable standards that govern trust acquisition decisions, the Secretary has not only observed, but has given concrete expression to, the Indian Reorganization Act's limiting principles. Cf. *Lichter*, 334 U.S. at 783 (recognizing that subsequent "administrative practices" under a statute may demonstrate the "definitive adequacy" of the terms of the statutory authorization).[7]

In sum, the court of appeals' decision in this case reflects a "practical understanding that in our increasingly complex society * * * Congress simply cannot do its job absent an ability to delegate power under

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[7] Congress has revisited the Indian Reorganization Act on several occasions since the Secretary's promulgation of the land acquisition regulations. See Indian Reorganization Act Amendments of 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 709; Indian Reorganization Act Amendments of 1990, Pub. L. No. 101-301, § 3(b)-(c), 104 Stat. 207; Indian Reorganization Act Amendments of 1988, Pub. L. No. 100-581, Title I, § 101, 102 Stat. 2938; see also Indian Land Consolidation Act, 25 U.S.C. 2201 *et seq.* (extending the reach of 25 U.S.C. 465 to all Tribes). Congress has not expressed any disagreement with the Secretary's understanding of his authority under 25 U.S.C. 465 to acquire land in trust for Tribes and individual Indians.

broad general directives." *Mistretta*, 488 U.S. at 372. The directive at issue here, while to some extent "broad" and "general," nonetheless is accompanied by ample statutory guidance for the Secretary's exercise of his discretion. Moreover, in an area in which the Executive has historically exercised broad authority, such as the supervision of lands occupied by Indians,[8] such directives are especially appropriate. Section 465 does not, therefore, violate the non-delegation doctrine.

Section 465 has been in effect for more than 65 years, and the Secretary has relied upon it over that period to acquire more than nine million acres of land. See Pet. at 17, *Department of the Interior* v. *South Dakota*, 519 U.S. 919 (1996). Petitioner's contentions here call into question the status of those lands, on which numerous Tribes have come to depend. Such lands are often essential for tribal governmental and economic purposes, and the lands at issue here have been used by the Choctaw Nation for those purposes. Nothing in the practical experience under Section 465 suggests a basis for its invalidation at this late date.

c. Petitioner further contends (Pet. 13-14) that the decision below conflicts with *Florida Department of Business Regulation* v. *United States Department of the Interior*, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986). Petitioner is mistaken.

In *Florida Department of Business Regulation*, various state agencies challenged the Secretary's decision, pursuant to 25 U.S.C. 465, to acquire land to be held in trust for the Seminole Indians. Noting that the

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[8] See, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 209 (1983); *Central Mach. Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160, 163 (1980); *United States* v. *Jackson*, 280 U.S. 183, 191 (1930); *United States* v. *Hitchcock*, 205 U.S. 80, 85 (1907).

Quiet Title Act, 28 U.S.C. 2409a, bars title challenges to trust or restricted Indian lands, the court of appeals held that, once land has been transferred into trust status, judicial review of the Secretary's decision to acquire the land is impliedly forbidden under Section 702 of the Administrative Procedure Act (APA), 5 U.S.C. 702. 768 F.2d at 1254. The court therefore held that the APA did not waive the United States' sovereign immunity for purposes of that case. *Id.* at 1254-1255. The court also held that the Secretary's decision was unreviewable under Section 701(a)(2) of the APA, 5 U.S.C. 701(a)(2), as a decision "committed to agency discretion by law." 768 F.2d at 1255.[9]

As petitioner concedes (Pet. 14 n.5) and as the Eleventh Circuit expressly noted, the state agencies in *Florida Department of Business Regulation* did "not challenge the constitutionality of the Secretary's acts [*i.e.*, acquiring trust lands] nor the constitutionality of the statute pursuant to which he acted [*i.e.*, 25 U.S.C. 465]." 768 F.2d at 1252.[10] As a consequence, the court

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[9] The United States now takes the position that review is available under the APA of the Secretary's decisions to acquire land in trust, if review is sought before the United States actually takes the land into trust for that purpose. See Pet. at 24-25, *Department of the Interior* v. *South Dakota*, 519 U.S. 919 (1996), (No. 95-1956); see also 61 Fed. Reg. 18,082 (1996) (promulgating a regulation, now codified at 25 C.F.R. 151.12, to provide an opportunity for judicial review before land is taken into trust).

[10] Petitioner nonetheless asserts (Pet. 14 n.5) that the Eleventh Circuit concluded that 25 U.S.C. 465 "confers standardless authority on the Executive to acquire land." But the Eleventh Circuit did not hold that Section 465 confers standardless authority on the Secretary of the Interior. Rather, the court held that Section 465 grants the Secretary broad discretion that is not judicially reviewable under the APA. That decision does not purport to address the constitutionality of Section 465.

of appeals had no occasion to address whether Section 465 is an unconstitutional delegation of legislative power. The Eleventh Circuit's holding therefore poses no conflict with the Tenth Circuit's holding in this case.[11]

2. Petitioner asserts (Pet. 22) that the decision below "deepen[s]" a circuit conflict over whether Indian country, within the meaning of 18 U.S.C. 1151, encompasses tribal trust land that is not within the external boundaries of a formal reservation. No such conflict exists. The Tenth Circuit's resolution of the question is correct and consistent with the decisions of this Court and other courts of appeals.

a. Historically, the term "Indian country" has been used to identify land that, "[g]enerally speaking," is subject to the "primary jurisdiction * * * [of] the Federal Government and the Indian tribe inhabiting it." *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998). In 1948, Congress enacted the statutory definition of Indian country, which consists of "all land within the limits of any Indian reservation," 18 U.S.C. 1151(a); "all dependent Indian com-

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[11] As petitioner notes, the United States recently filed a petition for a writ of certiorari in *American Trucking Associations* v. *United States Environmental Protection Agency*, 195 F.3d 4 (D.C. Cir. 1999) (holding that Section 109 of the Clean Air Act, 42 U.S.C. 7409, as interpreted by the EPA, is an unconstitutional delegation of legislative power), petition for cert. pending *sub nom. Browner* v. *American Trucking Ass'ns*, No. 99-1257 (filed Jan. 27, 2000). There is no need for the Court to hold the petition in this case pending the disposition of the petition in *American Trucking*. The two cases involve different statutes, different agencies, and different governmental programs; this case arises in the unique context of a challenge by a tribal member to the United States' title to lands held in trust for Indians. See pp. 3, 6 note 3, *supra*.

munities," 18 U.S.C. 1151(b); and "all Indian allotments, the Indian titles to which have not been extinguished," 18 U.S.C. 1151(c).

Section 1151 reflects the two criteria that this Court "previously * * * had held necessary for a finding of 'Indian country'": "first, [the lands] must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Native Village of Venetie*, 522 U.S. at 527. Prior to the enactment of Section 1151 in 1948, this Court had already found that reservation lands and allotments satisfied those requirements. See, *e.g.*, *United States* v. *Pelican*, 232 U.S. 442, 449 (1914) (Indian country includes individual Indian allotments held in trust by the United States because they "remain[] Indian lands set apart for Indians under governmental care"); *Donnelly* v. *United States*, 228 U.S. 243, 269 (1913) (Indian country includes lands within formal reservations). Congress used the term "dependent Indian communities" in Section 1151(b) to codify this Court's understanding, as expressed in *United States* v. *McGowan*, 302 U.S. 535 (1938), and *United States* v. *Sandoval*, 231 U.S. 28 (1913), that other lands, although not formally designated as a reservation, may also possess the attributes of "federal set-aside" and "federal superintendence" characteristic of Indian country. *Native Village of Venetie*, 522 U.S. at 530; see, *e.g.*, *McGowan*, 302 U.S. at 538-539 (Reno Indian Colony land held in trust by the United States is Indian country); *Sandoval*, 231 U.S. at 45-49 (same for Pueblo Indian lands).

Here, the court of appeals, consistent with *Native Village of Venetie*, held that the trust lands at issue are "Indian country," within the meaning of Section 1151, because they are "validly set-aside for the tribe under

the superintendence of the federal government." Pet. App. 11a. The court found it unnecessary to decide whether those lands are more properly categorized as an informal reservation, under Section 1151(a), or as a dependent Indian community, under Section 1151(b), because "no matter which categorical label we choose to affix, the property in this case, owned by the United States in trust for the Choctaw Nation, is Indian Country." *Ibid.*[12] The court recognized that this Court has used both labels in engaging in essentially the same analysis of the Indian country status of land that was neither a formal reservation nor an allotment. The Court engaged in that analysis in *Native Village of Venetie*, 522 U.S. at 532-534, in considering whether the fee lands at issue were a dependent Indian community under Section 1151(b), whereas the Court engaged in that analysis in *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991), in considering whether the trust lands at issue were an informal reservation under Section 1151(a). Contrary to petitioner's assertion (Pet. 23), then, the court of appeals did not create a "*fourth* category" of Indian country. Rather, the court recognized that the trust lands at issue come within at least one of the three statutory categories, because the trust lands possess the two characteristics of Indian country reflected in

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[12] The Eighth Circuit has taken a similar approach. See *United States* v. *Azure*, 801 F.2d 336, 339 (1986) (holding that, because a house located on trust land that is not part of a formal reservation is "part of either a *de facto* reservation or a dependent Indian community," the "house is located in Indian country"); cf. *Langley* v. *Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985) ("[W]hether lands are merely held in trust for the Indians or whether the lands have officially been proclaimed a reservation, the lands are clearly Indian country.").

Section 1151. See *Native Village of Venetie*, 522 U.S. at 527.

The court of appeals' decision is in accord with several decisions of this Court holding or assuming that tribal trust lands were Indian country although they were not part of a formal reservation. In *Potawatomi*, the Court concluded that lands held in trust by the United States for the Tribe were "validly set apart for the use of the Indians as such, under the superintendence of the Government," and therefore were Indian country, with the consequence that the State did not have the authority to tax sales of goods to tribal members that occurred on those lands. 498 U.S. at 511. The Court specifically rejected the contention that the tribal trust land was not Indian country because it was not a reservation, noting that no "precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges." *Ibid.*[13] See also *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 452-453 & n.2 (1995) (treating tribal trust lands as Indian country); *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123-125

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[13] Petitioner erroneously contends (Pet. 26) that the Court's ruling in *Potawatomi* on the Indian country status of the trust lands was dictum, asserting that 25 U.S.C. 465 prevents a State from taxing sales to tribal members on trust lands, whether or not the lands are Indian country. Petitioner misunderstands the provision of Section 465 that states that "such lands or rights [held by the United States in trust for Indians] shall be exempt from State and local taxation." The provision exempts only the lands (or rights) themselves from state taxation. It does not prevent the imposition of a state sales tax on goods sold on the lands. See *Mescalero Apache Tribe*, 411 U.S. at 155-158. The *Potawatomi* Court therefore understood that the question in that case turned on, *inter alia*, whether the locus of the sale was in Indian country.

(1993) (same); *United States* v. *John*, 437 U.S. 634, 649 (1978) (observing that "[t]here is no apparent reason why these lands, which had been purchased [by the United States] in previous years for the aid of those Indians, did not become a 'reservation,' at least for purposes of federal criminal jurisdiction"); *McGowan*, 302 U.S. at 539.

Nor is there any conflict between the decision below and the decisions of other circuits. The courts of appeals have consistently rejected claims that trust land that is not part of a formal reservation is not Indian country. See, *e.g.*, *United States* v. *Driver*, 945 F.2d 1410, 1415 (8th Cir. 1991), cert. denied, 502 U.S. 1109 (1992); *Langley* v. *Rider*, 778 F.2d 1092, 1095 (5th Cir. 1985); cf. *United States* v. *Cook*, 922 F.2d 1026, 1031 (2d Cir.) (land owned by Indians but supervised by the United States), cert. denied, 500 U.S. 941 (1991). See generally *Narragansett Indian Tribe* v. *Narragansett Elec. Co.*, 89 F.3d 908, 920 (1st Cir. 1996) ("[T]he vast majority of cases we have found which analyze what constitutes a dependent Indian community since § 1151(b) was enacted find there is such a community if the land is held in trust * * * or as settlement lands.").[14]

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[14] Petitioner suggests (Pet. 24-25) that this case is distinguishable because the trust lands are used for tribal government and tribal business purposes, rather than for tribal housing. But petitioner cites no case resting on any such distinction. To the contrary, the trust lands that the Court held to be Indian country in *Potawatomi* were used for tribal business purposes. See 498 U.S. at 507, 511. Indeed, the fact that the trust lands at issue are the seat of the tribal government *supports* the conclusion that those lands are Indian country, and thus are subject to the primary criminal jurisdiction of the United States and the Tribe, rather than the State.

No question of the status of trust lands as Indian country was presented in *United States* v. *Stands*, 105 F.3d 1565 (8th Cir. 1997), the only decision that petitioner claims (Pet. 21-22) to conflict with the decision below. *Stands* concerned the status of an individual Indian allotment, which the court of appeals held to be Indian country. 105 F.3d at 1574; see *ibid.* (observing that trial testimony concerning "trust land" was "essentially irrelevant to the question at hand"). In passing, the court stated, without analysis, that "[f]or jurisdictional purposes, tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country." *Id.* at 1572. But the court also acknowledged that "[i]n some circumstances, off-reservation tribal trust land may be considered Indian country." *Id.* at 1572 n.3. The former statement is mere dictum—not what the court actually "held," as petitioner erroneously asserts (Pet. 21)—and, in any event, is unsupported by the Eighth Circuit's own precedents. See, *e.g.*, *Driver*, 945 F.2d at 1415; *United States* v. *Azure*, 801 F.2d 336, 338-339 (1986); *United States* v. *South Dakota*, 665 F.2d 837, 839-843 (1981), cert. denied, 459 U.S. 823 (1982); see also, *e.g.*, *Potawatomi*, 498 U.S. at 511.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 99-1174

IN THE

Supreme Court of the United States

HOLLIS EARL ROBERTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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IN THE

Supreme Court of the United States

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HOLLIS EARL ROBERTS,

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REPLY BRIEF FOR PETITIONER

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1. The United States does not deny the importance of the first question presented by this case. Nor could it. Since the petition was filed, the government itself has urged this Court to clarify the bounds of the nondelegation doctrine, as it grudgingly notes in a footnote at the end of its argument on that issue. *See* Opp. at 14. n.11 (discussing the government's pending petition in *Browner* v. *American Trucking Assn's*, No. 99-1257 (filed Jan. 27, 2000) ("*ATA*")). That footnote purports to distinguish this case from *ATA* on the ground that the cases involve "different statutes, different agencies, and different governmental programs," but the distinction is specious. The point is that both cases turn on the *same* legal issue—the limits, if any, imposed by the Constitution under the nondelegation doctrine.

It is on that same legal issue that the United States has sought review in the *ATA* case. Its petition notes that the D.C. Circuit's ruling in that case "raises issues of extraordi-

nary governmental concern," Pet. in No. 99-1257 at 9, including primarily the nondelegation doctrine. It advises the Court that the D.C. Circuit's decision applying that doctrine "opened to constitutional attack * * * numerous other federal statutes containing similarly broad grants of authority to administrative agencies." *Id.* at 16. It cites the same cases in support of its petition that it cites in the opposition here. *Compare id.* at 12 n.5 *with* Opp. at 8. And it has noted a pertinent split in the circuits over application of the nondelegation doctrine. Pet. in No. 99-1257 at 19 n.11. The same circuit conflict, on the same issue of "extraordinary governmental concern," is squarely presented here.

We agree with the government—and with the ever growing number of commentators[1]—that this Court should revisit the nondelegation doctrine. This case presents the nondelegation doctrine in its purest form, because—as the government concedes, Opp. at 10 n.6—the administrative action at issue here was an exercise of unbridled statutory discretion, not limited in any way by applicable regulations. *ATA*, by contrast, involves a circumstance where the agency by regulation has attempted to place limits on the discretion granted by Congress, adding a wrinkle that does not encumber the nondelegation issue here. *See* Pet. at 17-19 & n.9.

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[1] In addition to the commentators cited in the petition, *see* Cass Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 356 (1999) ("In the most extreme cases, open-ended grants of authority should be invalidated. * * * A Supreme Court decision to this effect could have some of the salutary effects of the *Lopez* decision in the Commerce Clause area, offering a signal to Congress that it is important to think with some particularity about the standards governing agency behavior."). *See also* Lisa Schultz Bressman, Schechter Poultry *at the Millennium*, 109 Yale L.J. 1399, 1402 (2000) (discussing author's perception of "the emergence of a new delegation doctrine that has the potential to shift the current debate on delegation and democracy").

2. In the face of its own effort to gain review on the nondelegation issue, the United States focuses on attempting to identify reasons why this case—presenting the same issue—does not merit review.[2] That exercise is unavailing.

a. The government does not dispute that the Eighth Circuit's decision in *South Dakota* v. *United States Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995), is directly at odds with the decision below. It is, however, quick to point out—as the petition made clear—that the Eighth Circuit's judgment was vacated by this Court. *See* 519 U.S. 919 (1996). True enough. But it is also true that the reasoning of the Eighth Circuit in *South Dakota* is in direct conflict with the reasoning of the Tenth Circuit below, *see* Pet. at 10-13; that—despite the government's intimations to the contrary, Opp. at 7 n.4—the vacatur was based on the adoption of new regulations designed to avoid the constitutional issue, *see* Pet. at 12; and that neither those regulations nor any other regulations purported to cabin the Secretary's acquisition of the property at issue here. Thus, it is plain that this case would have come out differently under the rationale applied by the Eighth Circuit in *South Dakota*.

The fundamental jurisprudential divide embodied in the Eighth Circuit's decision in *South Dakota* and the Tenth Circuit's decision in this case—expressly rejecting *South Dakota*—introduces great uncertainty over the constitutionality of Section 465 and exacerbates the widespread conflict

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[2] One such attempt is the government's sheepish suggestion that "there is reason to question" whether the nondelegation issue may be raised in this context. Opp. at 6 n.3. The government, however, did not identify for the courts below any such "reason to question" petitioner's ability to raise that issue, and should not be heard to do so now. In any event, the fact that a quiet title action with respect to Indian trust lands might be barred by 28 U.S.C. § 2409a does not provide "reason to question" the ability of a defendant to challenge the *jurisdictional basis* for his conviction under the Indian Major Crimes Act.

and confusion over the nondelegation doctrine.[3] No salutary purpose would be served—certainly the government offers none—by permitting such uncertainty to persist.

b. The United States also contends that certiorari is not warranted because the congressional directive at issue here "is accompanied by ample statutory guidance for the Secretary's exercise of his discretion." Opp. at 12. Nonsense. There is *no* statutory guidance in Section 465—which permits the purchase of lands by the Secretary, "in his discretion" and "for Indians."[4] If such an unbridled grant of authority constitutes "ample statutory guidance," then the nondelegation doctrine is indeed dead. But this Court has repeatedly observed that the doctrine is a core constitutional principle, "rooted in the principle of separation of powers that underlies our tripartite system of government." *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989). *See* Pet. at 9. In light of the bald statutory language at issue here, this case presents an ideal opportunity to reaffirm that core principle, which is now shrouded in doubt due to the conflict and

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[3] "Even if a decision is vacated, * * * the force of its reasoning remains, and the opinion of the Court may influence resolution of future disputes." *Finburg* v. *Sullivan*, 658 F.2d 93, 100 n.14 (3d Cir. 1980). *See also* Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. Chi. L. Rev. 77, 93 (1955) ("If the opinion below is officially reported, it will always remain in the volume; even if the decision is vacated, the force of the reasoning remains.").

[4] As noted in the petition (pp. 13-14), the Eleventh Circuit has joined the Eighth in recognizing that the statute "does not delineate the circumstances under which exercise of [the Secretary's] discretion is appropriate." *Florida Dep't of Bus. Regulation* v. *United States Dep't of Interior*, 768 F.2d 1248, 1256 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986). The United States attempts to dismiss this statement, *see* Opp. at 13-15, but it is undeniable that the Eleventh Circuit's conclusion that the statute provides no guidance for the Secretary's discretion is squarely in conflict with the view of the Tenth Circuit below that "the statute itself" provides the necessary guidance to the Secretary. Pet. App. 18a n.8.

confusion in the lower courts. If, on the other hand, the government is correct, then the nondelegation principle should at least receive a public burial by this Court. Allowing the doctrine to flounder in the lower courts would only further unsettled this bedrock area of law.

c. The United States in any event does not seriously contend that the "statute itself" provides the necessary guidance, but instead searches far and wide in its effort to identify pertinent limits on the unbridled statutory grant of power. It contends that such guidance is found in "the purposes of the Act as a whole, its factual background, and the statutory context." Opp. at 9. Thus, the government tells us, the statute permits the Secretary to acquire land "when the acquisition would serve such purposes as advancing tribal economic development, assisting tribal self-governance, and restoring the ancestral tribal land base." *Id.* at 10.

These "limitations," however, are found nowhere in the statute itself. It is not at all clear, therefore, whether exercises of this authority outside the "boundaries" the government suggests would violate the statute where the only statutory limitation is one of unguided "discretion" to acquire land "for Indians." *See Florida Dep't of Bus. Regulation*, 768 F.2d at 1256 (Indian Reorganization Act "does not delineate the circumstances under which exercise of [the Secretary's] discretion is appropriate"). Any challenge to such exercises of authority would no doubt be defended by the government as fully authorized by the broad terms of the statute, with no acknowledgement of its facile claim here that there are discernible boundaries to the statutory authority.

Even on their own terms, the limitations suggested by the government do not provide the intelligible principles necessary to avoid a nondelegation problem. A requirement that an acquisition "advanc[e] tribal economic development," Opp. at 10, certainly offers no boundary on the broad statu-

tory discretion, for any acquisition of land "for Indians" could no doubt be justified on the theory that it would "advanc[e] tribal economic development"—including the hypothetical acquisitions discussed by the Eighth Circuit in *South Dakota*. *See* Pet. at 11.[5] At the end of the day, the government's submission does not so much identify guidance for the exercise of discretion as stand for the proposition that the nondelegation doctrine itself is no impediment to the exercise of such unbridled discretion. It is that conclusion—shared by the Tenth Circuit below but rejected by the Eighth Circuit—that this Court should review.

3. The United States also does not dispute the importance of the second question presented by the petition, a matter of touchstone jurisdictional significance for myriad properties across the United States and activities taking place on them. *See* Pet. at 28-29. Instead, as it does with respect to the nondelegation issue, the government devotes its efforts largely to arguing the merits and trying to distinguish away contrary precedents. Here again, however, its efforts fail.

a. Whatever is true of the Tenth Circuit decision in this case, it is *not*—as the government asserts (Opp. at 15)—"consistent with" *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). In *Venetie* this Court reaffirmed that "Indian country exists * * * *only if* the land in question" fits into one of the "three different categories" codified in Section 1151. *Id.* at 527 n.2, 530 (emphasis

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[5] The government's discussion of the Secretary's self-imposed limitations on the exercise of discretion—in the form of regulations—is simply beside the point. Opp. at 10-11. No such regulations existed when the property at issue here was acquired in 1976 by an Area Director of the Bureau of Indian Affairs. As we noted in the petition, moreover, the existence of regulations does not answer the nondelegation problem. *See* Pet. at 19 n.9. The government does not respond to that point.

added). As we explained in our petition (pp. 24-25)—and the United States does not dispute—"'[t]he government has *never* argued that the [building complex in this case] is part of a reservation, dependent Indian community or allotment,'" *id.* at 23 (quoting government; emphasis added); and, in holding that this property is Indian country, the Tenth Circuit below felt no need "to affix" any "categorical label" to it in accordance with Section 1151. Pet. App. 11a. This seat-of-the-pants approach to the Indian country determination flies in the face of *Venetie*, not to mention Section 1151.

The United States nevertheless argues that the Tenth Circuit correctly held that the building complex in this case is "'Indian country,' within the meaning of Section 1151," because it meets the federal set-aside and superintendence requirements applied in *Venetie*. Opp. at 15-16. The *Venetie* Court did apply these requirements in determining whether the land in that case fit within Section 1151(b). *See* 522 U.S. at 532-534. But it never suggested that these requirements governed the Indian country determination—without regard to whether the property at issue fits within Section 1151's terms. To the contrary, the *Venetie* Court began with the text of Section 1151, *id.* at 526-527, then explained that it was intended to codify "the three different categories of Indian country mentioned in our prior cases." *Id.* at 530. As is clear from the Court's discussion of those cases, in enacting Section 1151 Congress did not intend to codify the type of property at issue here, which does not remotely resemble the Indian reservations, dependent Indian communities, or allotments dealt with in prior cases. *See* Pet. at 24-25.[6]

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[6] Petitioner has explained at length why the building complex in this case fails both the federal set-aside and superintendence requirements. *See* Mem. of Law in Support of Mot. to Vacate Conviction for Lack of Federal Jurisdiction Pursuant to 28 U.S.C. § 2255, at 48-91. But to be clear, even if the property met those requirements in the abstract, it would not be Indian country *unless* it fit within Section 1151's terms.

Confining Indian country to its congressionally intended—and textually plausible—reach accords with the jurisdictional significance of Indian country status. As the United States acknowledges, Indian country is "subject to the primary criminal jurisdiction of the United States and the Tribe, rather than the State." Opp. at 18 n.14; *see* Pet. at 20-21. And, as this Court admonished in *Venetie*, "[w]hether the concept of Indian country should be modified is a question entirely for Congress," not the courts. 522 U.S. at 534.

b. The United States suggests that the Tenth Circuit "decision is in accord with several decisions of this Court holding or assuming that tribal trust lands were Indian country although they were not part of a formal reservation." Opp. at 17. As we have explained (Pet. at 25-27), however, none of these pre-*Venetie* cases squarely addresses the Indian country question presented here and, if anything, they simply add to the confusion shrouding this issue. In any event, *United States* v. *John*, 437 U.S. 634, 649 (1978) and *United States* v. *McGowan*, 302 U.S. 535 (1938) are plainly distinguishable; the trust lands in those cases qualified as Indian country under Section 1151(a) and (b), respectively. *See* Pet. at 25. *Oklahoma Tax Commission* v. *Sac & Fox Nation*, 508 U.S. 114 (1993), is to the same effect. There, the Court remanded so that it could be "determined whether the relevant tribal members live in Indian country—whether the land is within reservation boundaries, on allotted lands, or in dependent communities." *Id.* at 126. *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), is distinguishable and does not discuss—let alone purport to decide—the question here. *See* Pet. at 26 & n.15. At most, the Court there held that the tribal trust land in *Potawatomi* "qualifies as a reservation for *tribal immunity purposes*." *Id.* at 511 (emphasis added).

c. The United States says that "[t]he courts of appeals have consistently rejected claims that trust land that is not

part of a formal reservation is not Indian country." Opp. at 18. But—as the Tenth Circuit itself recognized below, Pet. App. 8a n.3—the Eighth Circuit has held that "tribal trust land beyond the boundaries of a reservation [acquired pursuant to Section 465] is ordinarily *not* Indian country." *United States* v. *Stands*, 105 F.3d 1565, 1572 & n.3 (8th Cir. 1997) (emphasis added), *cert. denied*, 522 U.S. 841 (1997); Pet. at 21-22. This was not a "passing" thought, Opp. at 19, but rather was central to the Eighth Circuit's resolution of the Indian country issue in *Stands*. While the property at issue in *Stands* was tribal trust land, the Eighth Circuit emphasized that it would not qualify as Indian country *unless* the evidence showed that it was an allotment within the meaning of Section 1151(c), as the prosecution alleged in that case. *See* 105 F.3d at 1573-74. In the Tenth Circuit, by contrast, tribal trust land may qualify as Indian country *regardless* of whether it fits into any particular category of Section 1151.[7]

d. Finally, any question of the significance and potentially far-reaching effect of the decision below is answered by *H.R.I., Inc.* v. *Environmental Protection Agency*, 198 F.3d 1224 (10th Cir. 2000). There, the Tenth Circuit—specifically relying on the decision in this case and engaging in the same *ultra vires* approach to the Indian country

[7] None of the prior Eighth Circuit decisions cited by the United States (Opp. at 19) eliminate the conflict between *Stands* and the Tenth Circuit decision in this case. *United States* v. *Azure*, 801 F.2d 336 (8th Cir. 1986)—which the Eighth Circuit addressed in *Stands*, *see* 105 F.3d at 1572 n.3—simply establishes that tribal trust land is Indian country when it fits into one of the categories established by Section 1151. *See* Pet. at 21-22 n.11. We agree. The same goes for *United States* v. *Driver*, 945 F.2d 1410, 1415 (8th Cir. 1991), *cert. denied*, 502 U.S. 1109 (1992) and *United States* v. *South Dakota*, 665 F.2d 837, 840-843 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982), which involved Indian housing communities determined to be dependent Indian communities within Section 1151(b). *See also United States* v. *Cook*, 922 F.2d 1026, 1031 (2d Cir. 1991) (concluding that land in question fit within Section 1151(b)), *cert. denied*, 500 U.S. 941 (1999), cited at Opp. at 18.

same *ultra vires* approach to the Indian country determination—held that tribal trust land qualified as Indian country within Section 1151(a), even though it was part of a *disestablished* Indian reservation. *Id.* at 1249-54. In so holding, the court of appeals emphasized that, under its decision in this case, "informal reservations" continue to exist under Section 1151(a), apart from whether land qualifies as a dependent Indian community under Section 1151(b). *See id.* at 1250, 1252. This ruling also directly contravenes *Venetie*, *see* Pet. at 23-24, and, coupled with the decision below, is destined to create even more conflict and confusion on this touchstone jurisdictional issue.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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